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No. 02-102

In The Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Texas Fourteenth District

AMICUS BRIEF OF STONEWALL LAW ASSOCIATION, PARENTS, FAMILIES, & FRIENDS OF LESBIANS & GAYS, TEXAS HUMAN RIGHTS FOUNDATION, LESBIAN/GAY RIGHTS LOBBY, GAY & LESBIAN ADVOCATES & DEFENDERS, NATIONAL CENTER FOR LESBIAN RIGHTS, & HUMAN RIGHTS CAMPAIGN IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE

The amici[1] share an interest in challenging Texas Penal Code § 21.06, the so-called "Homosexual Conduct Law," which criminalizes certain sexual conduct for same-sex couples but not heterosexual ones. The amici are the Stonewall Law Association of Greater Houston; Parents, Families, and Friends of Lesbians and Gays of Houston; the Texas Human Rights Foundation; Lesbian/Gay Rights Lobby of Texas; Gay & Lesbian Advocates & Defenders; the National Center for Lesbian Rights; and the Human Rights Campaign.[2] Amici are a diverse group of local, state, and national organizations united by a commitment to equality for gay men and lesbians. Their work on behalf of gay and lesbian citizens includes prosecuting impact litigation, lobbying state and federal governments for non-discriminatory laws, educating the public through research and information initiatives, and providing legal and other support to persons affected by discrimination on the basis of sexual orientation.

The amici know all too well that discrimination is often rationalized by reference to same-sex sodomy laws like the one Petitioners have asked this Court to review. These organizations and their members have a special interest in ensuring that rights guaranteed by the United States Constitution are not undermined by laws like § 21.06, which contains an unwarranted sexual orientation- and sex-based classification and unfairly authorizes government intrusion into the private lives of certain

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief, in whole or in part. No person or entity, other than the amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] More detailed statements of interest from the amici are included in the attached Appendix.

citizens. The amici therefore support Petitioners application for a writ of certiorari.

SUMMARY OF THE ARGUMENT

It is critically important that the Court review the constitutionality of Texas's Homosexual Conduct Law, which criminalizes the sexual conduct of same-sex partners but permits heterosexual couples to engage in the very same acts without penalty. Such laws, whether or not enforced, have devastating effects on gay and lesbian citizens and their families. By singling out gays and lesbians as sexual criminals, § 21.06 and other same-sex sodomy laws stigmatize gays and lesbians and thereby legitimize discrimination, hatred, and even violence against them.

The huge burden that same-sex sodomy laws impose on the most private aspect of the lives of gay and lesbian citizens also merits this Court's attention. Although the law targets only same-sex couples, the objective data show that the specific sexual behavior targeted by the law is widely practiced by heterosexuals as well. There is no credible evidence that the sexual expression of gay men and lesbians is somehow deviant or detrimental. To the contrary, there is ample evidence that, as with heterosexuals, sexual intimacy is vital to the health and well-being of gay and lesbian adults and is an important component of stable, loving same-sex relationships.

Nor is it possible to identify any justification for same-sex sodomy laws that could balance these substantial harms. The traditional justification – that homosexuality poses a moral threat against which society must be defended – cannot withstand scrutiny. Despite what their proponents say, same-sex sodomy laws have little to do with "traditional morality." For example, not until 1974 did Texas first single out gays and lesbians for special condemnation.

Because the Homosexual Conduct Law targets a politically disfavored group and imposes unique and substantial harms on that group, the law simply cannot be reconciled with our highest constitutional values. This Court should grant certiorari.

ARGUMENT

I. The direct and indirect harms caused by same-sex sodomy laws make gay and lesbian Americans second-class citizens.

This Court should grant certiorari to consider the constitutionality of the Homosexual Conduct Law, Texas Penal Code § 21.06,[3] because the harms that the law inflicts on homosexual citizens of Texas are real and substantial. Although courts and commentators have sometimes presumed that sodomy laws are harmless because such laws are rarely enforced,[4] this presumption is fundamentally flawed.[5] In fact, even when unenforced,

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[3] Texas's Homosexual Conduct Law prohibits certain sex acts only when performed by same-sex partners. That law provides:

> (a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.
>
> (b) An offense under this section is a Class C misdemeanor.

TEX. PEN. CODE ANN. § 21.06 (Vernon 1999). "Deviate sexual intercourse" is defined as "any contact between any part of the genitals of one person and the mouth or anus of another person" or "the penetration of the genitals or the anus of another person with an object." *Id.* § 21.01.

[4] *See, e.g., Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (Powell, J., concurring) ("The history of nonenforcement [of the statute] suggests the moribund character today of laws criminalizing this type of private, [illegible] conduct.").

[5] *See* Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643, 648 (2001) (arguing that "the relevant legal actors . . . are encouraged to

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criminal laws nevertheless may have profound effects on society.[6] Laws such as Texas's Homosexual Conduct Law harm gay and lesbian citizens by inhibiting mental and emotional health, providing justification for a wide range of private and official discrimination, and facilitating anti-gay violence.[7]

First and most fundamentally, the Homosexual Conduct Law and other laws like it interfere with healthy mental and emotional development.[8] As scientific and sociological literature on the subject demonstrates,[9] sexual expression is a vital component of personal psychological well-being.[10] It is likewise essential to healthy intimate

conclude that sodomy laws do not really matter"); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 104 (2000) (undertaking a case study of sodomy laws to illustrate "how the mere existence of an 'unenforced' criminal law creates a criminal class whose members are treated as felons, even though they have been convicted of no crime").

[6] *See* Leslie, *supra* note 5, at 103.

[7] Of course, Texas's Homosexual Conduct Law *was* enforced in this case, thus negating any comfort that gays and lesbians in Texas may take from the supposed "history of nonenforcement," *Hardwick*, 478 U.S. at 198 n.2, of similar statutes in other states. Gay and lesbian Texans presently are subject to an immediate threat of prosecution, which causes fear and anxiety to them as well as their families, friends, colleagues, employers, and others in the heterosexual community.

[8] *See* Leslie, *supra* note 5, at 116-21.

[9] This Court considered evidence of such harms in *Brown v. Board of Education*, 347 U.S. 483 (1954). In *Brown*, the Court considered the detrimental psychological and emotional effects of school segregation on blacks. The Court looked to psychological and sociological journals to examine the social and personal implications of denying blacks equal educational opportunities. Just as the Court noted that "the impact is greater when [school segregation] has the sanction of the law," this Court should consider the harmful psychological and social impact that upholding the Homosexual Conduct Law will have on gay and lesbian Americans. *See id.* at 494.

[10] EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 360 (1994)

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relationships between adults;[11] in both heterosexual and homosexual relationships, sex functions to strengthen the partners' interpersonal bonds and as an expression of the couple's feelings for each other.[12] The Homosexual Conduct Law necessarily takes a psychological toll on gay and lesbian Texans by intruding into this most personal of activities and by penalizing intimate relations so fundamental to healthy adulthood.[13] Indeed one federal court has recognized that the Homosexual Conduct Law has a negative effect on the mental health of gay and lesbian Texans.[14]

(national study by University of Chicago finding persons who have sexual experiences report higher levels of happiness than those who have no sexual experiences); WILLIAM MASTERS & VIRGINIA JOHNSON, HUMAN SEXUAL INADEQUACY (1970); John Gonsiorek & J.R. Rudolph, *Homosexual Identity: Coming Out and Other Developmental Events, in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 161-76 (John Gonsiorek & James Weinrich eds., 1991).

[11] *See, e.g.*, PEPPER SCHWARTZ & PHILIP BLUMSTEIN, AMERICAN COUPLES 193, 201 (1983) ("[A] good sex life is central to a good overall relationship.").

[12] *Id.* at 201, 205-06; DAVID MCWHIRTER & ANDREW MATTISON, THE MALE COUPLE: HOW RELATIONSHIPS DEVELOP 262 (1984).

[13] Gonsiorek & Rudolph, *supra* note 10; Anthony R. D'Augelli, *Developmental Implications of Victimization of Lesbian, Gay, and Bisexual Youth, in* STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 187, 191 (Gregory M. Herek ed., 1998) (describing the psychological consequences of stigmatization on gay, lesbian, and bisexual youth).

[14] As that court explained in *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982), *rev'd*, 769 F.2d 289 (5th Cir. 1985):

> [T]he existence of these criminal laws, even if they are not enforced (like § 21.06), does result in stigma, emotional stress and other adverse effects. The anxieties caused to homosexuals – fear of arrest, loss of jobs, discovery, etc. – can cause severe mental health problems. Homosexuals, as criminals, are often alienated from society and institutions, particularly law enforcement officials.

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Moreover, the Homosexual Conduct Law is psychologically harmful because it "fuel[s] internalized homophobia in some homosexuals, including . . . self-derision, self-hatred, hatred of others in the group, and acting out self-fulfilling prophesies about one's own inferiority."[15] And sodomy laws necessarily inhibit – indeed all but turn into self-incrimination – what has been demonstrated to be a psychologically necessary action for many gays and lesbians: that of "coming out" to friends and family by revealing a previously repressed or hidden sexual orientation.[16] By encouraging gays and lesbians to repress or hide their sexual orientation with the threat of criminal sanction, the Homosexual Conduct Law in fact encourages conduct that may be unhealthy both mentally and physically. [17]

Id. at 1130. The district court's findings were based upon the testimony of a psychiatrist and a sociologist "whose qualifications as experts in the field of homosexuality were outstanding and whose testimony was very credible [and consistent with] the positions adopted by various medical and psychiatric associations." *Id.* at 1129, 1132.

[15] Leslie, *supra* note 5, at 117 (quoting Brief of Amici Curiae American Psychological Association and the American Public Health Association in Support of Respondents at 7, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140)).

[16] *See, e.g.*, S. Hammersmith & M. Weinberg, *Homosexual Identity: Commitment, Adjustment and Significant Others*, 36 SOCIOMETRY 56, 78 (1973) (concluding that "having . . . 'settled into' a homosexual identity . . . leads to better psychological adjustment as indicated by a more stable, positive self-image, fewer anxiety symptoms, and less depression"); J. Leserman et al., *Gay Identification and Psychological Health in HIV-Positive and HIV-Negative Gay Men*, 24 J. APPLIED SOC. PSYCHOLOGY 2193, 2205 (1994) (presenting findings that "better psychological health [is] related to gay self-acceptance, participating in gay organizations and groups, socializing with other gay men, and parental disclosure and acceptance of being gay").

[17] *See, e.g.*, G. Herek, *Why Tell If You're Not Asked? Self-Disclosure, Inter-Group Contact, and Heterosexuals' Attitudes Toward Lesbians and Gay Men, in* OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY 197, 211 (G. Herek et al. eds., 1996) (noting that "closeted gay women and men may experience a painful discrepancy between their public

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The Homosexual Conduct Law also enables individuals and institutions to cite the fact that "homosexual conduct" is illegal in order to rationalize all manner of discrimination against gay and lesbian Texans. Because some forms of sexual expression by gays and lesbians are illegal, the argument goes, the people who participate in them are criminals. Employers, bureaucrats, school administrators, lawmakers, litigants, and others routinely use such logic to support disadvantaging gays and lesbians. For example, those who advocate depriving gays and lesbians of full citizenship have claimed that the Homosexual Conduct Law justifies closing the public library to gay groups;[18] denying permanent residence to a homosexual immigrant;[19] depriving gay parents of custody of their children;[20] prohibiting gays from fostering or adopting

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and private lives," causing them to feel "they are living a lie," and further noting that not coming out can "create considerable strain for lesbian and gay male couples, who must hide or deny their relationship to family and friends," which ultimately "may have a deleterious effect on psychological adjustment"); S. Cole et al., *Elevated Physical Health Risk Among Gay Men Who Conceal Their Homosexual Identity*, 15 HEALTH PSYCHOLOGY 243 (1996) (finding that "those who concealed the expression of their homosexual identity experienced a significantly higher incidence of cancer . . . and several infectious diseases").

[18] Associated Press, *Gay Rights Supporters' Meeting Site Draws Protest*, DALLAS MORNING NEWS, Jan. 15, 1996, at 8D (describing protesters' objection to a gay group's meeting in the San Antonio public library because gays "engage in deviant conduct that is illegal under the state penal code").

[19] *See, e.g., In re Naturalization of Longstaff*, 538 F. Supp. 589, 590-92 (N.D. Tex. 1982) (rejecting plea of homosexual immigrant because he had violated the Homosexual Conduct Law and therefore lacked good moral character), *aff'd*, 716 F.2d 1439 (5th Cir. 1983).

[20] Jo Ann Zuniga, *Gay Parents Are Fighting Back Against Blackmail, Court Bias*, HOUSTON CHRON., June 27, 1994, at A11 (reporting that common tactic of vilifying homosexual parent in custody battle is "give[n] . . . teeth" by § 21.06); *cf. Jilek v. Chatman*, 613 S.W.2d 558 (Tex. Civ. App.—Beaumont 1981, no writ) (relying, in part, on evidence

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children;[21] banning gay and lesbian student groups on college campuses;[22] opposing protection of gays and lesbians from discrimination in employment;[23] and denying gay and lesbian Texans protection under proposed hate crime legislation.[24]

Indeed, such laws routinely are used in civil litigation – particularly in the areas of family law and public employment law – to disadvantage gay people who have never even been charged, let alone convicted of any

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of father's admitted bisexuality and history of same-sex relationships to uphold order transferring custody from father to mother).

[21] Polly R. Hughes, *Bill Would Ban Gay Texans From Adopting Children*, HOUSTON CHRON., Dec. 11, 1998, at A38 (noting that the sponsor of a bill to prohibit gays from fostering or adopting children in state custody relied on Homosexual Conduct Law); *see also* Mike Ward, *Gay Groups Urge Veto of Penal Code With Sodomy Law*, AUSTIN AM. STATESMAN, May 29, 1993, at B10 (reporting that conservative groups had favored retention of the sodomy ban in the revised penal code because the law serves as a basis for denying gay and lesbian couples the right to adopt).

[22] Bruce Tomaso, *Stephen F. Austin Senate Bans Gay Group*, DALLAS MORNING NEWS, Nov. 2, 1994, at 1A (quoting student leader who said that student government voted to ban gay student group because "[w]e felt they're in contradiction to Texas state law"); *see also Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317, 1320 n.4 (5th Cir. 1984) (quoting university administrator's argument that "it would be most inappropriate for a state institution officially to support a [gay] student organization which is likely to incite, promote and result in acts contrary to and in violation of the Penal Code of the State of Texas").

[23] Ginger D. Richardson, *Gay Rights Effort Likely to Be Tabled*, FT. WORTH STAR-TELEGRAM, Jan. 19, 1999, at 1 (reporting that city council member killed a measure to add gays and lesbians to Fort Worth antidiscrimination ordinance because it would be at odds with Homosexual Conduct Law).

[24] Stephanie E. Griest, *Hate Crimes Act Named for Byrd Heads for House*, AUSTIN AM. STATESMAN, Mar. 12, 1999, at B10 (quoting state lawmaker who opposed extending protections to gays and lesbians because "the act of homosexuals is illegal" [sic]).

crime.[25] In the area of family law, the presumption that a gay parent is violating a state sodomy law motivates the outcome in many custody decisions.[26] *See, e.g., Ex parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (upholding restrictions on lesbian mother's visitation rights, reasoning in part that "the conduct inherent in lesbianism is illegal in Alabama" and that the mother's "[e]xposing her children to such a lifestyle, one that is illegal under the laws of this state and immoral in the eyes of most of its citizens, could greatly traumatize them"); *Bottoms v. Bottoms*, 457 S.W.2d 102, 108 (Va. 1995) (noting that, although "a lesbian mother is not *per se* an unfit parent," "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth . . . ; thus, that conduct is another important consideration in determining custody"). Similarly, sodomy statutes have been used as a basis for denying public employment to homosexuals.[27] *See, e.g., Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 142-43 n.13 (N.D. Tex. 1981) ("The overriding reason that the Plaintiff was not hired [as a storekeeper for the property storeroom of the Dallas Police Department] was because he admitted to engaging in homosexual conduct prohibited by Texas penal statutes."). Thus the mere presence in a state's criminal code of a statute like the Homosexual Conduct Law is enough to stigmatize gay and lesbian citizens.[28]

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[25] *See* Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 TEX. L. REV. 813, 813-14 (2001).

[26] *See generally id.* at 822, 831-36.

[27] *See generally id.* at 836.

[28] The stigmatization that follows from criminalizing sex acts between same-sex partners should not be underestimated. In Texas, merely saying that another is homosexual is slanderous *per se* because of the implication that he or she has violated the Homosexual Conduct Law. *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ); *see also Plumley v. Landmark Chevrolet*, 122 F.3d 308, 310 (5th Cir. 1997) (same).

By stigmatizing gays and lesbians as "outlaws," the Homosexual Conduct Law and its counterparts in other states also contribute to an atmosphere of hatred and violence that puts gay men and lesbians at risk. As one scholar has observed, "the relationship between homosexual sodomy laws and homophobic violence is not merely coincident, but coordinate: the criminalization of homosexual sodomy and criminal attacks on gay men and lesbians work in tandem."[29] In Texas, for example, gays and lesbians are among the most frequent victims of bias-motivated crimes, including rape, robbery, murder, assault, intimidation, and vandalism.[30] Gay and lesbian youth, in particular, routinely are tormented with epithets, bullied, and even attacked by their peers,[31] often with severe consequences for their physical and mental health.[32] Sodomy laws facilitate such violence by providing a means for its perpetrators to "rationalize their violence

[29] Gregory Herek, *The Context of Anti-Gay Violence: Notes on Cultural and Psychological Heterosexism*, 5 J. INTERPERS. VIOLENCE 316 (1990).

[30] According to recent hate crime statistics, only blacks were more often the victims of hate crimes. Texas Dept. of Public Safety, Crime in Texas (1997); *see also* Griest, *supra* note 24, at B10 (recounting personal stories of sister of a gay man who had been shot three times and set on fire; prominent lesbian whose neighbor threatened to kill her; minister who found a rainbow flag burning on church lawn).

[31] For example, one recent study concluded that gay, lesbian, and bisexual teens report "significantly greater exposure to violence" than their peers, are three times as likely to miss school because they feel unsafe, and are twice as likely to have been injured or threatened with a weapon at school. Anne H. Faulkner & Kevin Cranston, *Correlates of Same-Sex Sexual Behavior in a Random Sample of High School Students*, 88 AM. J. PUB. HEALTH 262, 263-64 (1998).

[32] D'Augelli, *supra* note 13, at 189-91; Gary Remafedi, *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 AM. J. PUB. HEALTH 57 (1998) (concluding that homosexual and bisexual teenagers are at greater risk of suicide than other teens).

as vigilante enforcement of sodomy laws."[33] Such laws further promote anti-gay violence by deterring homosexual victims of bias-motivated crimes from reporting those crimes to the police; "[t]his underreporting, and the consequent lower risk of arrest, encourages attacks against gay citizens."[34]

The link between the existence of sodomy laws on the books and the psychological and social harms described above is not merely speculative. Findings from recent empirical research show that laws like the Homosexual Conduct Law do, in fact, cause serious psychological and social harm to individuals, groups, and social institutions, even if unenforced.[35] One empirical study found that an "unenforced" sodomy law:

- "bolstered [gays' and lesbians'] parents' fear and hostility towards homosexuality";[36]
- supported "hostility and threats posed by individuals outside the family";[37]
- "fractured" the "relationship many people have to the law and to the police force in general," causing lesbians and gays to not "rely on

[33] Leslie, *supra* note 5, at 124 ("Many anti-gay attackers perceive themselves as performing legitimate law enforcement by bashing gay people who elude prosecution under state sodomy laws.").

[34] *Id.* at 125.

[35] Goodman, *supra* note 5. Goodman's empirical study is an ethnographic study that compared groups of South African gays and lesbians before and after the repeal of South Africa's sodomy laws. *Id.* at 647-48. South Africa was chosen because it gave an opportunity for an examination of "the social effects of sodomy laws . . . in a legal regime in which sodomy laws existed under similar conditions as they do in the United States." *Id.* at 647. "[L]ike their American counterparts, [the South African sodomy laws] were generally not enforced." *Id.* at 679.

[36] *Id.* at 692.

[37] *Id.* at 694.

the police for problems that arise in situations even tangentially related to their sexual identity;"[38]

- caused "an internal schism within those lesbian and gay individuals who wish to view themselves as law-abiding members of society;"[39] and
- played "a significant role in strengthening anti-gay ideologies in other institutions of cultural authority."[40]

Overturning § 21.06 and similar statutes is essential not only to removing the barriers to full citizenship for gay men and lesbians, but also to changing the environment of hatred and bigotry that leads to violence. This Court should reject any suggestion, therefore, that the Petitioners' constitutional challenge is somehow trivial. The direct and indirect harms that laws like the Homosexual Conduct Law cause to gay and lesbian Americans are immeasurable.

II. The Homosexual Conduct Law and other laws like it simply cannot be justified by appeals to "morality."

Section 21.06, with its discriminatory bias against same-sex intimacy, finds no support in "traditional" notions of morality. To the contrary, it is only relatively recently that such acts have been proscribed solely between people of the same sex.[41] Before the concept of a

[38] *Id.* at 708, 732.

[39] *Id.* at 732.

[40] *Id.* at 663.

[41] Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 539 (1992) (tracing historical evolution of the term "sodomy" – from a catchall description of all non-procreative sex to the modern

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unique "homosexual identity" gained currency in late nineteenth- and early twentieth-century American culture,[42] "sexual touchings between men were determined to be licit or illicit according to criteria that applied equally to heterosexual practices. . . . Although illicit sexual acts were seen as sinful, immoral, criminal, or all three, before the 1870s illicit sexual acts between men were not seen as fundamentally different from, or necessarily worse than, illicit acts between a man and a woman."[43]

Even today, of the thirteen states that outlaw sodomy, nine apply their sodomy bans to both gay and non-gay people alike.[44] Only four states, including Texas, punish

usage as a synonym for anal intercourse, particularly between two men – and documenting the attendant shifts in American law).

[42] Scholars have observed that, although same-sex relationships have been documented throughout history, the concept of homosexuality (or, for that matter, heterosexuality) as a defining characteristic of one's identity is relatively recent. Comparing modern Western notions of sexual identity to those of antiquity, for example, one scholar reports: "[T]he currently fashionable distinction between homosexuality and heterosexuality (and similarly between 'homosexuals' and 'heterosexuals' as individual types) had no meaning for the classical Athenians: there were not, so far as they knew, two different kinds of 'sexuality'. . . ." David M. Halperin, *Is There a History of Sexuality?*, *reprinted in* LESBIAN AND GAY STUDIES READER (Henry Abelove et al., eds., 1993). Making a similar point about American history, another scholar notes that "colonial society lacked even the category of homosexual or lesbian to describe a person," though colonial court records refer to incidents of sexual acts between two women or two men. John D'Emillio, *Capitalism and Gay Identity*, *in* LESBIANS, GAY MEN, AND THE LAW 26, 28 (William Rubenstein ed., 1993). It was only in the 1920s and 1930s that American scientific literature began describing homosexuality "as a condition, something that was inherent in a person, a part of his or her 'nature.'" *Id.* at 29.

[43] Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073, 1088 (1988).

[44] *See* ALA. CODE § 13A-6-65 (1994); FLA. STAT. ANN. § 800.02 (1992); IDAHO CODE § 18-6605 (1997); LA. REV. STAT. ANN. § 14:89

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solely same-sex conduct,[45] and Texas's ban on "homosexual conduct" is only 28 years old.

The legislative history of Texas's Homosexual Conduct Law demonstrates just how recently discrimination against gay people has surfaced in American law. The first Texas sodomy statute, enacted in 1860, was interpreted to prohibit bestiality and anal sex, whether committed by husband and wife, unmarried heterosexuals, or homosexuals. *See Baker v. Wade*, 553 F. Supp. 1121, 1148 (N.D. Tex. 1982) (citing Tex. Pen. Code art. 342 (1860)), *aff'd on other grounds*, 743 F.2d 236 (5th Cir. 1984), *rev'd*, 769 F.2d 289 (5th Cir. 1985); *Pruett v. Texas*, 463 S.W.2d 191 (Tex. Crim. App. 1970). In 1943, the statute was amended to prohibit all oral and anal sex. Tex. Pen. Code art. 524 (1943). It was not until 1974 that the Texas Legislature repealed the general prohibition on sodomy. That year the Legislature enacted the Homosexual Conduct Law, for the first time criminalizing consensual relations only between people of the same sex. *Id.* § 21.06 (Vernon's 1999). The common misconception that gays and lesbians have "always" been singled out and their sexual relations criminalized is belied by the facts.

Defenders of these modern-day same-sex sodomy statutes often resort to the position (as the State of Texas did below) that homosexuality is *malum in se*, inherently wicked or evil by its very nature.[46] But the outdated stereotype of gays and lesbians as perverted and morally corrupt has long been discredited. Modern research

(1986); MISS. CODE ANN. § 97-29-59 (1973); N.C. GEN. STAT. § 14-177 (1993); S.C. CODE ANN. § 16-15-120 (1998); UTAH CODE ANN. § 76-5-403 (1995); VA. CODE ANN. § 18.2-361 (1996).

[46] KAN. CRIM. CODE ANN. §§ 21-3501(2), 21-3505 (1995); MO. ANN. STAT. §§ 566.010, 566.090 (1999); OKLA. STAT. ANN. tit. 21, § 886 (1999).

[46] BLACK'S LAW DICTIONARY (6th ed. 1990).

demonstrates not only that homosexuality is "normal" (*i.e.*, a natural orientation for some people),[47] but also that gays and lesbians are productive, well-adjusted citizens.

Substantial scientific and psychological research has shown that homosexuality is not an "abnormal" condition.[48] Because of these studies, the American Psychiatric Association removed homosexuality as a mental illness from the Diagnostic and Statistical Manual of Mental Disorders in 1973.[49] Subsequent research has confirmed that gays and lesbians show no more psychopathology than heterosexuals.[50] "Indeed, virtually all systemic study

[47] Recent studies have confirmed that the number of gay men and women is between two and ten percent of the general population. *See, e.g.*, Stuart Michaels, *The Prevalence of Homosexuality in the United States, in* TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH, 55-56 (Robert P. Cabaj & Terry S. Stein eds., 1996).

[48] For example, as early as 1957, one landmark study concluded that homosexuality is "within the normal range, psychologically." Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECH. 18, 30 (1957); *see also* Robert B. Dean & Harold Richardson, *Analysis of MMPI Profiles of Forty College-Educated Overt Male Homosexuals*, 28(6) J. CONSULTING PSYCHOL. 483, 485 (1964) (finding no significant difference between functioning heterosexuals and homosexuals); Marcel T. Saghir et al., *Textbook of Homosexuality: III. Psychiatric Disorders and Disability in the Male Homosexual*, 126(8) AM. J. PSYCHOL. 1079, 1086 (1970) (study of 35 unmarried heterosexual men and 89 gay males finds "an absence of striking differences").

[49] AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (1973) ("DSM-II"). The World Health Organization followed suit in its International Classification of Diseases, dropping the term homosexuality as a diagnosis in 1992. *See* Michael King & Annie Bartlett, *British Psychiatry and Homosexuality*, 175 BRITISH J. OF PSYCHIATRY 106, 106 (1999).

[50] Gregory M. Herek, *Myths about Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 142 (1991) (review of dozens of studies shows no relationship between gay or lesbian sexual orientation and psychopathology); James Krajeski, *Homosexuality and the Mental Health Professions: A Contemporary History, in* TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH, *supra*

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has shown sexual orientation to be independent of psychopathology."[51]

Nor is there any scientific reason to view the sexual practices of gay and lesbian couples as anything other than healthy and normal.[52] The sexual conduct of gays and lesbians is comparable to that of heterosexuals. The sexual activity that is the subject of the Homosexual Conduct Law is widely practiced by heterosexuals as well as homosexuals. Approximately 75% of both heterosexual men and heterosexual women have engaged in oral sex. Twenty-five percent of heterosexual men and 20% of heterosexual women have experienced anal intercourse.[53] Despite the widespread incidence of this conduct, it is *illegal* only if engaged in by people of the same sex.

Scientists and social workers also have focused on the ability of gay men and lesbians to function in society. Research repeatedly has shown that gay and lesbian parents have the same quality of parenting skills as heterosexual parents and that children raised by gay and

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note 47, at 20 (finding that, beginning in the 1960s, many studies that used standardized psychological instruments began to provide a "firm research basis for the finding that homosexuality does not equate with psychopathology").

[51] BERTRAM J. COHLER & ROBERT M. GALATZER-LEVY, THE COURSE OF GAY AND LESBIAN LIVES: SOCIAL AND PSYCHOANALYTIC PERSPECTIVE 294 (2000).

[52] For example, the transmission of disease, particularly HIV, is not peculiar to same-sex intercourse. *See, e.g., Gryczan v. Montana*, 942 P.2d 112, 124 (Mont. 1997) (noting that "heterosexual contact is now the leading mode of HIV transmission in this country"); *Kentucky v. Wasson*, 842 S.W.2d 487, 501 (Ky. 1992) (rejecting HIV transmission as justification for Kentucky's "sodomy" law because there was no distinction "between male-male and male-female anal intercourse as a method of preventing AIDS").

[53] LAUMANN ET AL., *supra* note 10 at 318-19 (national survey of sexual practices published by the University of Chicago).

lesbian parents are as well-adjusted as children raised by heterosexual parents.[54] "As with heterosexual parents, the ability of gay and lesbian parents to foster the healthy development of their children appears to be more related to unique family dynamics and other contextual factors and less tied to parents' sexual orientation than society would have us believe."[55] Contrary to prevalent myths and stereotypes, moreover, gay men and women are no more likely than heterosexuals to commit child sexual abuse. For example, in a study of 269 children seen for sexual abuse, researchers found that only one adult offender could be identified as a lesbian and that only one offender could be identified as a gay man. In contrast, 77% of abuse against girls and 74% of abuse against boys was committed by the adult male heterosexual partner of a female family member.[56] Same-sex sodomy statutes cannot be

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[54] *See* Bonnie M. Mucklow & Gladys K. Phelan, *Lesbian and Traditional Mothers' Responses to Adult Response to Child Behavior and Self Concept*, 44 PSYCHOL. REP. 880 (1979) (finding no differences between lesbian and heterosexual mothers in self-concept, maternal attitudes, or responses to slides of children's behaviors); Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1036 (1992) (review of 30 studies showed "no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect relative to that among offspring of heterosexual parents"); Charlotte J. Patterson & Raymond W. Chan, *Gay Fathers and Their Children*, *in* TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH, *supra* note 47, at 383 (available data suggest that five to ten percent of children of gay fathers, about the same percentage as those raised by heterosexuals, grow up to be gay or bisexual).

[55] Jorge C. Armesto, *Developmental and Contextual Factors That Influence Gay Fathers' Parental Competence: A Review of the Literature*, 3 PSYCHOL. OF MEN AND MASCULINITY 67 (2002) (citations omitted) (explaining further that "children of gay and lesbian parents do not appear to differ from children of heterosexual parents in terms of gender identity development, sex role behavior, sexual orientation, mental health, self-concept, or intelligence").

[56] Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 PEDIATRICS 41, 41-42 (July 1994); *see also* Edward P.

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justified with the argument that discrimination against homosexuals or proscriptions on consensual, same-sex sexual activity are necessary for the welfare of society.[57]

Lesbians and gay men are a diverse and capable group of people. "[T]he gay male and lesbian community is diverse and multiethnic and differs by gender, socioeconomic status, and few generalizations apply across cultural borders.... Research on mental health has documented that as individuals, couples, and a social community, gay men and lesbians do not show lower levels of adjustment."[58] Far from posing a threat to society, gay men and lesbians continuously have made unique and significant contributions.[59]

Sarafino, *An Estimate of Nationwide Incidence of Sexual Offenses Against Children*, 58 CHILD WELFARE 127, 133 (1979) (finding abuse of boys by peer-oriented homosexual males is "scarce"); A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons, in* SEXUAL ABUSE OF CHILDREN: SELECTED READINGS 87, 89 (Barbara McComb Jones et al., eds., 1980) (finding no abuse of boys by peer-oriented homosexual males; instead, the study found that offenders either have been sexually attracted exclusively to children during their lives or are heterosexual males frustrated by their relationships).

[57] *See* American Psychiatric Ass'n, Fact Sheet: Gay and Lesbian Issues (1996) (calling for nondiscrimination on the basis of sexual orientation); American Psychol. Ass'n, Resolution of the American Psychological Association Council of Representatives (1975), <http://www.apa.org/pi/lgbpolicy/homepage.html> (same); Lesbian and Gay Issues, 38(3) NASW News (National Ass'n of Social Workers), Mar. 1993, at 15 ("NASW will support the repeal of all laws against any form of consensual adult sexual activity."); American Ass'n of Sex Educators, Counselors, and Therapists, Code of Ethics (1993), <http://www.aasect.org/code.htm> (calling for nondiscrimination on the basis of sexual orientation).

[58] Linda Garnets & Douglas Kimmel, *Lesbian and Gay Male Dimensions, in* PSYCHOLOGICAL PERSPECTIVES ON HUMAN DIVERSITY IN AMERICA 143, 174-75 (Jacqueline D. Goodchilds, ed., 1991).

[59] *See, e.g.*, T. COWAN, GAY MEN AND WOMEN WHO ENRICHED THE WORLD (1988) (discussing achievements of various individuals believed

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As the Kentucky Supreme Court held when striking down Kentucky's ban on consensual sexual relations between same-sex partners:

> In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform.... We need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice.

Kentucky v. Wasson, 842 S.W.2d 487, 501 (Ky. 1992). Same-sex sodomy laws cannot be squared with the Constitution's requirement that all citizens receive equal treatment under the law. This Court should grant the writ of certiorari and address the important constitutional issues raised by these laws and the burdens they impose on gay and lesbian Americans.

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to be gay, lesbian, or bisexual, including authors, mathematicians, politicians, economists, scientists, and artists).

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 19, 2002

APPENDIX

The Stonewall Law Association of Greater Houston ("Stonewall Lawyers") is a non-profit bar association founded in 1990 for the purpose of promoting human rights and, in particular, the rights of gay, lesbian, bisexual, and transgender citizens of Texas. Its members include attorneys, law professors, law students, and local lawmakers. Many of the organization's members have been in the position of defending a gay or lesbian client's rights – in the workplace, at school, as parents – against an assault justified on the grounds that "homosexual conduct" is criminal in Texas.

Parents, Families, and Friends of Lesbians and Gays of Houston, Texas ("P-FLAG") is the local chapter of an international, grassroots organization founded by parents of gays and lesbians to support, educate, and advocate for the families and friends of gays and lesbians, as well as for gays and lesbians themselves. P-FLAG actively promotes the health and well-being of gays and lesbians and their families and friends through monthly meetings, public awareness campaigns, speaker panels for educational and corporate institutions, scholarships to deserving high school seniors and college students, lobbying and testifying at legislative hearings, and individual support via a telephone hotline and the Internet. P-FLAG parents regularly suffer with their children the harms that come from discrimination based on their son's or daughter's sexual orientation, including harassment, violent crimes, vandalism, threats, and loss of employment. The mere existence of same-sex sodomy statutes (no matter how rarely enforced) exacerbates these problems, as the statutes often are used to rationalize and excuse such discrimination.

The mission of the Texas Human Rights Foundation (the "Foundation") is to end discrimination against lesbian, gay, bisexual, and transgendered persons, and persons with HIV and AIDS, through public education,

high impact litigation, and legal assistance. The Foundation sponsors a hotline for Texans who have questions about their rights or need legal help because of discrimination, and it publishes a widely distributed resource booklet, *AIDS & the Law*, in both English and Spanish. As part of its litigation strategy, the Foundation funded two earlier legal challenges to Texas's same-sex sodomy statute. The Foundation believes that Petitioners' case presents this Court with an important opportunity finally to resolve whether same-sex sodomy statutes are unconstitutional.

The Lesbian/Gay Rights Lobby of Texas ("LGRL") works toward the elimination of social, legal, and economic discrimination based on sexual orientation through lobbying, education and research directed toward the Texas Legislature and other state governmental agencies. LGRL has advocated for the rights of gay and lesbian Texans on issues such as discrimination in the workplace and in public schools and colleges, hate crime legislation, and increased protections and services for people living with HIV. During the 2001 legislative session, LGRL once again lobbied for the repeal of Texas's Homosexual Conduct Law. Due in part to LGRL's efforts, the bill to repeal § 21.06 was voted out of the House Criminal Justice Committee, but it was not brought to a vote before the legislative session adjourned. The Texas Legislature does not reconvene until 2003.

Gay & Lesbian Advocates & Defenders ("GLAD") is a public interest law firm founded in 1978. GLAD's mission is to secure and advocate for the legal rights and interests of lesbians, gay men, and bisexuals, and it does so through litigation and public education in the six New England states. GLAD has considerable legal expertise in the area of civil rights and civil liberties for gay men, lesbians, and bisexuals. Throughout its nearly 25-year history, GLAD has represented individuals who have been charged with violating laws regulating intimate conduct in several states. GLAD challenged the Massachusetts sodomy law

in *GLAD v. Reilly*, 436 Mass. 132 (2002) as well as the Rhode Island law, *State v. Lopes*, 660 A.2d 707 (R.I. 1995). GLAD believes these laws impose a stigma on gay people and that persons charged under these laws face a serious risk of harm to their physical safety as well as to their professional livelihood if they are publicly identified.

Since 1977 the National Center for Lesbian Rights ("NCLR") has advocated for fairness and equality for lesbians under the law. NCLR's legal advocacy extends to gay men, bisexual and transgendered individuals as well, primarily in the areas of family security and protection, elder law, rights of youth and fair immigration policy. NCLR has witnessed first-hand the ravages of "homosexual conduct" laws on the fair and objective application of the law to lesbians and gay men in this country. From child custody cases to employment or protection of youth from harassment, such laws are deployed to deny lesbians and gay men equal treatment under the law.

The Human Rights Campaign ("HRC") is America's largest gay and lesbian organization, with over 450,000 members nationwide. HRC lobbies lawmakers for fairer laws, educates the public through information initiatives, helps define the national debate on public policies important to gay and lesbian Americans, and through its bipartisan PAC, works to elect fair-minded candidates to public office. HRC is dedicated to ensuring that gay, lesbian, bisexual and transgender Americans can be open, honest and safe at home, at work, and in the community.

PETITIONER'S

BRIEF

(8)

Supreme Court, U.S.
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No. 02-102

IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE AND TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the Court of Appeals of Texas Fourteenth District

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QUESTIONS PRESENTED

1. Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law – which criminalizes adult, consensual same-sex intimate behavior, but not identical behavior by different-sex couples – violate the Fourteenth Amendment right to equal protection of the laws?

2. Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

3. Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?

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The State of Texas arrested Petitioners Lawrence and Garner, charged them with a crime, and convicted them under the State's "Homosexual Conduct" law for engaging in consensual same-sex intimacy in the privacy of Lawrence's home. The Texas law and Petitioners' convictions are constitutionally indefensible for two reasons. First, the law discriminates without a legitimate and rational State purpose, in violation of the Equal Protection Clause. In 1973, Texas broke with both the evenhanded laws of the past and the decisive modern trend toward decriminalization. Instead, the State chose to criminalize consensual, adult sexual behaviors *only* for those whose partners are of the same sex – gay men and lesbians. Texas's decision to classify along that line brands gay men and lesbians as lawbreakers and fuels a whole range of further discrimination, effectively relegating them to a form of second-class citizenship. Second, this criminal law directly implicates fundamental interests in intimate relationships, bodily integrity, and the home. Texas's law and the few other remaining consensual sodomy statutes – both those that discriminate and those that do not – trample on the substantive liberty protections that the Constitution erects in order to preserve a private sphere shielded from government intrusion. Here, where the State authorizes such intrusion into the homes and lives only of same-sex couples, the constitutional injury is especially clear and disturbing.

OPINIONS AND ORDERS BELOW

The Texas Court of Criminal Appeals' orders refusing discretionary review are unreported. Pet. App. 1a, 2a. The decision of the *en banc* Court of Appeals for the Fourteenth District of Texas is reported at 41 S.W.3d 349. Pet. App. 4a. The court's prior panel opinion is unreported. Pet. App. 80a. The judgments of the Harris County Criminal Court are unreported. Pet. App. 107a, 109a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 15, 2001. Pet. App. 3a. On April 17, 2002, the Texas Court of Criminal Appeals denied a timely consolidated petition for

discretionary review. Pet. App. 1a, 2a. Petitioners filed their timely petition for a writ of certiorari in this Court on July 16, 2002. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Texas Penal Code § 21.06 ("Homosexual Conduct") provides: "(a) A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. (b) An offense under this section is a Class C misdemeanor."

Texas Penal Code § 21.01(1) provides: "'Deviate sexual intercourse' means: (A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Petitioners' Arrests, Convictions, and Appeals.

Late in the evening of September 17, 1998, Harris County, Texas, sheriff's officers entered John Lawrence's home and there intruded on Lawrence and Tyron Garner having sex. The officers were responding to a false report of a "weapons disturbance." Pet. App. 129a, 141a.[1] They arrested Petitioners, jailed them, and did not release them from custody until the next day. Clerk's Record in *State v. Lawrence*, at 3 ("C.R.L."); Clerk's Record in *State v. Garner*, at 3 ("C.R.G.").

The State charged Petitioners with violating the Texas "Homosexual Conduct" statute, Tex. Pen. Code § 21.06 (the "Homosexual Conduct Law" or "Section 21.06"), which

[1] The person who called in the report later admitted his allegations were false and was convicted of filing a false report. *See* R.A. Dyer, *Two Men Charged Under State's Sodomy Law*, Hous. Chron., Nov. 6, 1998, at A1.

criminalizes so-called "deviate sexual intercourse" with another person of the same sex, but not identical conduct by different-sex couples. *Id.* The sole facts alleged by the State to make out a violation were that each Petitioner "engage[d] in deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." Pet. App. 127a, 139a. The State did not allege that the conduct was public, non-consensual, with a minor, or in exchange for money. *Id.* The charges rested solely on consensual, adult sexual relations with a partner of the same sex in the privacy of Lawrence's home. *Id.*

After proceedings and initial convictions in the Justice of the Peace Court, Petitioners appealed for a trial *de novo* to the Harris County Criminal Court. C.R.L. 15; C.R.G. 12. They filed motions to quash the charges on the ground that the law violates the Fourteenth Amendment's guarantees of equal protection and privacy, both on its face and as applied to their "consensual, adult, private sexual relations with another person of the same sex." Pet. App. 117a-118a, 121a-122a, 130a-131a, 134a-135a. On December 22, 1998, the court denied the motions to quash. Pet. App. 113a. Lawrence and Garner then pled *nolo contendere*, Pet. App. 114a, preserving, under Texas procedural rules, their right to pursue previously asserted defenses. Tex. Code Crim. P. § 44.02. The court imposed on each a fine of $200 and court costs of $141.25. Pet. App. 107a-108a, 109a-110a, 116a.

In consolidated appeals to the Texas Court of Appeals, Lawrence and Garner argued that Section 21.06 impermissibly discriminates between citizens "[u]nder any characterization of the classification." Amended Brief of Appellants at 4, 5, 6-17 (Tex. App. filed Apr. 30, 1999) ("Am. Br."); Additional Brief of Appellants 1 n.1, 14-22 (Tex. App. filed Aug. 11, 2000) ("Add'l Br."); Petition for Discretionary Review at 7-13 (Tex. Crim. App. filed Apr. 13, 2001) ("Pet. Disc. Rev."). Petitioners also argued that the statute invades their right of privacy and preserved their contention that *Bowers v. Hardwick*, 478 U.S. 186 (1986), was wrongly decided. Am. Br. 5, 23-26; Add'l Br. 23 n.20; Pet. Disc. Rev. 16-19.

At oral argument in the Court of Appeals, counsel for the State conceded that "he could not 'even see how he could begin to frame an argument that there was a compelling State interest'" served by Section 21.06. Pet. App. 76a (quoting counsel for Texas). Texas has repeatedly identified its only aim as "enforcement of principles of morality and the promotion of family values." *See, e.g.*, State's Brief in Support of Rehearing En Banc 16 (Tex. App. filed Aug. 23, 2000) ("States' Br. in Supp. of Reh'g En Banc").

On June 8, 2000, a panel of the Court of Appeals reversed Petitioners' convictions under the Texas Equal Rights Amendment, holding that Section 21.06 impermissibly discriminates on the basis of sex. Pet. App. 86a-92a. After rehearing *en banc*, the Court of Appeals reinstated Petitioners' convictions on March 15, 2001. Pet. App. 3a, 4a. Citing *Bowers*, the court rejected Petitioners' substantive due process claim. Pet. App. 24a-31a. As to the federal equal protection claim, the court held that the statute was subject to and survived rational basis review, because it "advances a legitimate state interest, namely, preserving public morals." Pet. App. 13a. The court distinguished *Romer v. Evans*, 517 U.S. 620 (1996), as limited to discrimination in the right to seek legislation. Pet. App. 14a-15a.

Two Justices of the appellate court "strongly" dissented from the rejection of Petitioners' federal equal protection arguments. Pet. App. 42a. The dissent reasoned that:

> where the same conduct, defined as "deviate sexual intercourse[,]" is criminalized for same sex participants but not for heterosexuals[,] [t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict.

Pet. App. 44a. Petitioners timely sought discretionary review from the Texas Court of Criminal Appeals, which was refused. Pet. App. 1a, 2a.

B. The Homosexual Conduct Law

The Homosexual Conduct Law is of comparatively recent

vintage. It was enacted in 1973 when Texas repealed all of its then-existing laws that criminalized private sexual conduct between consenting adults. *See* 1973 Tex. Gen. Laws ch. 399, §§ 1, 3. Prior to that time, the criminality of consensual sexual conduct in Texas did not depend on whether a couple was same-sex or different-sex. In particular, oral as well as anal sex was a crime for all. 1943 Tex. Gen. Laws ch. 112, § 1. *See generally Baker v. Wade*, 553 F. Supp. 1121, 1148-53 (N.D. Tex. 1982) (reviewing history of Texas sodomy laws), *rev'd*, 769 F.2d 289 (5th Cir. 1985) (en banc).[2] Until 1973 Texas also criminalized fornication and adultery. *See* Tex. Pen. Code arts. 499-504 (1952) (repealed by 1973 Tex. Gen. Laws, ch. 399, § 3).

The 1973 repeals abolished all those crimes, 1973 Tex. Gen. Laws ch. 399, § 3, freeing heterosexual adult couples, married or unmarried, to engage in all forms of consensual, private, noncommercial sexual intimacy without state intrusion. In the same enactment, however, the Legislature adopted Section 21.06, *see id.* § 1, which for the first time singled out same-sex couples for criminal sanctions. Section 21.06 applies to "deviate sexual intercourse," which is defined as oral, anal, and certain other sexual conduct without regard to whether the actors are of the same or different sexes. *See* Tex. Pen. Code § 21.01(1).[3] But "deviate sexual intercourse" is *not* a crime when engaged in

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[2] Before 1943, an 1860 statute criminalized "the abominable and detestable crime against nature," Tex. Pen. Code art. 342 (1860); *see Baker*, 553 F. Supp. at 1148, which was held *not* to apply to oral sex. *See, e.g., Munoz v. State*, 281 S.W. 857 (Tex. Crim. App. 1926); *Prindle v. State*, 21 S.W. 360, 361 (Tex. Crim. App. 1893). Like the 1943 law, however, the 1860 statute applied to heterosexual as well as homosexual conduct. *See Adams v. State*, 86 S.W. 334 (Tex. Crim. App. 1905); *Lewis v. State*, 35 S.W. 372 (Tex. Crim. App. 1896).

[3] The present definition of "deviate sexual intercourse" reflects a 1981 amendment adding § 21.01(1)(B) to encompass penetration with "objects," which has been construed to include any part of the body. *See C.M. v. State*, 680 S.W.2d 53, 55-56 (Tex. App. 1984). In 1993, facing a sunset provision, Texas reenacted most of the Penal Code, including Section 21.06. *See* 1993 Tex. Sess. Law Serv. ch. 900 (Vernon). Several attempts to repeal the law have failed, *see, e.g.*, H.B. 687, 2001 Leg. 77th (R) Sess. (Tex.); *see also Baker*, 553 F. Supp. at 1126 & n.4, 1151.

privately by two consenting adults of different sexes. Rather, Section 21.06 criminalizes only "Homosexual Conduct," making it a punishable offense to engage in "deviate sexual intercourse with another individual of the same sex," but not identical conduct by heterosexual couples. Tex. Pen. Code § 21.06.[4]

Texas, of course, also has and enforces other laws that criminalize sexual conduct that takes place in public, Tex. Pen. Code §§ 21.07(a)(2), 21.08, that is violent or without consent, *id.* § 22.011(a)(1), that is in exchange for money, *id.* § 43.02, or that is committed with a minor, *id.* §§ 22.011(a)(2), 21.11. All of these prohibitions apply without regard to whether the actors are of the same or different sexes. Section 21.06, in contrast, applies to non-commercial, consensual, private sexual conduct between two adults – but only if they are of the same sex.

Because it singles out same-sex couples, this Texas law is unlike older legal prohibitions of "sodomy," *see infra* Point I.A.3, and differs fundamentally from the facially evenhanded Georgia law considered by the Court in *Bowers*, *see* 478 U.S. at 188 n.1. The Homosexual Conduct Law was substituted for a facially nondiscriminatory law at a time when many States, prompted by changing views about the proper limits of government power that were reflected in the American Law Institute's *Model Penal Code*, were revising their criminal codes and completely abandoning offenses like fornication and sodomy. *See Model Penal Code and Commentaries* §§ 213.2 cmt. 2, 213.6 note (1980). By 1986, 26 States had invalidated their sodomy laws. *Bowers*, 478 U.S. at 193-94. Today, only nine States retain criminal laws that bar consensual sodomy for all.[5] Between 1969 and 1989, Texas and seven other States legislatively replaced general laws with laws targeting homosexual couples. *See infra* at 21-22 &

[4] "Homosexual conduct" is a Class C misdemeanor punishable by a fine of up to $500. Tex. Pen. Code §§ 21.06(b), 12.23.

[5] Ala. Code §§ 13A-6-60(2), 13A-6-65(a)(3); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; La. Rev. Stat. Ann. § 14:89; Miss. Code Ann. § 97-29-59; N.C. Gen. Stat. § 14-177; S.C. Code Ann. § 16-15-120; Utah Code Ann. § 76-5-403(1); Va. Code Ann. § 18.2-361(A).

note 15. Four of those discriminatory laws have already been judicially invalidated, and one has been repealed. *See id.* Now only Texas and two other States criminalize same-sex conduct but not identical different-sex conduct by statute, while one other State has reached the same result through judicial construction of a facially evenhanded law.[6] Similarly, all but a few States have repealed criminal laws prohibiting fornication. *Infra* note 18.

Since its enactment, Section 21.06 has narrowly survived several federal and state constitutional challenges. In *Baker v. Wade*, a federal district court held that Section 21.06 violates the constitutional rights of privacy and equal protection. 553 F. Supp. at 1125. The court rejected the State's claimed justifications for Section 21.06 and found that, even when not enforced, the law results in serious harms to gay persons, including employment discrimination. *Id.* at 1130, 1146-47. Although the Texas Attorney General withdrew the State's appeal, a divided *en banc* Fifth Circuit allowed an appeal by an intervenor and reversed, citing the summary affirmance in *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976). *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc).

In the early 1990s, Texas Courts of Appeals declared Section 21.06 unconstitutional in two cases exercising state equity jurisdiction. *City of Dallas v. England*, 846 S.W.2d 957 (Tex. App. 1993); *State v. Morales*, 826 S.W.2d 201 (Tex. App. 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994). In both cases, the intermediate appellate court struck down the Homosexual Conduct Law under the Texas Constitution and found that the statute inflicted severe harms beyond the direct threat of criminal convictions. *See England*, 846 S.W.2d at 959; *Morales*, 826 S.W.2d at 202. As the State itself stipulated in *Morales*, Section 21.06

[6] Kansas and Missouri have same-sex-only statutes, Kan. Stat. Ann. § 21-3505(a)(1); Mo. Rev. Stat. § 566.090, although one intermediate court of appeals in Missouri has held that State's statute applicable only to non-consensual conduct, *State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App. 1999). Oklahoma's general statute has been construed to exclude different-sex couples. Okla. Stat. tit. 21, § 886; *Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986).

"brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law." *Id.* at 202-03.

In 1994, *Morales* was set aside by the Texas Supreme Court as reaching beyond the power of the State's equity courts. 869 S.W.2d at 943-47. The court ruled that constitutional review should occur in the context of a criminal prosecution, with final review in the Texas Court of Criminal Appeals. *Id.*[7] In the present criminal case, however, the Court of Criminal Appeals refused to exercise its jurisdiction to review the validity of the law, Pet. App. 1a, 2a, leaving its burdens in effect throughout Texas.

SUMMARY OF ARGUMENT

As the experience of Lawrence and Garner vividly illustrates, Section 21.06 puts the State of Texas inside its citizens' homes, policing the details of their most intimate and private physical behavior and dictating with whom they may share a profound part of adulthood. Texas has enacted and enforced a criminal law that takes away – from same-sex couples only – the freedom to make their own decisions, based upon their own values and relationships, about the forms of private, consensual sexual intimacy they will engage in or refrain from. The State defends this law only by saying the majority wants it so. Texas asserts a power of the majority to free itself from state dictates about private, consensual sexual choices, while using the criminal law to condemn and limit the choices of a minority.

This law and its application to Petitioners violate both the guarantee of equal protection *and* fundamental liberties safeguarded by the Fourteenth Amendment. Petitioners explain below why the equality claim and the liberty claim are each well rooted in the Constitution. The Court, however, need not rule on both constitutional violations if it chooses to focus on one

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[7] Although the Texas Supreme Court did not review *England*, due to a jurisdictional defect in that court, *see Morales*, 869 S.W.2d at 942 n.5 (noting dismissal of writ of error in *England* without reaching merits), the state supreme court's ruling in *Morales* removed the underpinnings of *England*.

infirmity rather than the other. Petitioners discuss the fundamental liberty claim under the Due Process Clause first, because even if the Court were not to reach that issue, a full appreciation of the personal interests affected by Section 21.06 also illuminates and informs the equal protection analysis that follows.

Fundamental liberty and privacy interests in adults' private, consensual sexual choices are essential to the ordered liberty our Constitution protects. The State may not, without overriding need, regiment and limit this personal and important part of its citizens' lives. More so than in 1986, when *Bowers v. Hardwick* was decided, it is clear today that such a fundamental right is supported by our basic constitutional structure, by multiple lines of precedent, and by a decisive historical turn in the vast majority of the States to repudiate this type of government invasion into private life. The well-established fundamental interests in intimate relationships, bodily integrity, and the sanctity of the home all converge in the right asserted here. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). That right belongs to all Americans, including gay men and lesbians, and should be shielded from Section 21.06's unjustified invasion. Much more is needed to outweigh fundamental individual interests than the majority's preferences. Indeed, the Fourteenth Amendment's protection of liberty exists to guard against the very impulse Texas acted on here. Principles of *stare decisis* do not, in these circumstances, justify adherence to *Bowers*.

Texas also has violated the Fourteenth Amendment's guarantee of equal protection of the laws. The Homosexual Conduct Law creates classes of persons, treating the same acts of consensual sexual behavior differently depending on who the participants are. By this law, Texas imposes a discriminatory prohibition on all gay and lesbian couples, requiring them to limit their expressions of affection in ways that heterosexual couples, whether married or unmarried, need not. The law's discriminatory focus sends the message that gay people are

second-class citizens and lawbreakers, leading to ripples of discrimination throughout society. Such a discriminatory law cannot satisfy even the minimal requirement that a legislative classification must be rationally related to a legitimate State purpose. *See Romer*, 517 U.S. 620. The bare negative attitudes of the majority, whether viewed as an expression of morality, discomfort, or blatant bias, cannot take away the equality of a smaller group. *See id.*; *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

ARGUMENT

I. Section 21.06 Violates Constitutional Rights to Liberty and Privacy Possessed by All Americans.

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*, 505 U.S. at 847. It is well settled that the Due Process Clause of the Fourteenth Amendment guarantees the personal liberty of Americans against encroachment by the States, and that this protection of liberty encompasses substantive fundamental rights and interests that are unenumerated. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *Casey*, 505 U.S. at 846-51; *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278-79 (1990); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977); *Moore v. City of E. Cleveland*, 431 U.S. 494, 501-03 (1977); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Griswold*, 381 U.S. at 482-85; *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923). Giving substance to "liberty" is necessary to maintain the individual freedoms that are the essence of American democracy, while also allowing government action that is justified by the collective good. *See Casey*, 505 U.S. at 849-51.

Among the liberties protected by the Constitution is the right of an adult to make choices about whether and in what manner to engage in private consensual sexual intimacy with another adult, including one of the same sex. This extremely personal

sphere implicates three aspects of liberty that have long been recognized as fundamental: the interests in intimate associations, in bodily integrity, and in the privacy of the home. For the State to limit and dictate the intimate choices of American couples in this realm without any substantial justification is repugnant to ordered liberty. *Stare decisis* does not require continued adherence to the Court's contrary decision in *Bowers*.

A. American Adults Have Fundamental Liberty and Privacy Interests in Making Their Own Choices About Private, Consensual Sexual Relations.

1. Well-Established Protections for Intimate Relationships, Bodily Integrity, and the Privacy of the Home Converge in This Vital Freedom.

Being forced into a life without sexual intimacy would represent an intolerable and fundamental deprivation for the overwhelming majority of individuals. Equally repugnant is any form of external compulsion to engage in sexual relations. There should be no doubt, then, that the Constitution imposes substantive limits on the power of government to compel, forbid, or regulate the intimate details of private sexual relations between two consenting adults.

All adults have the same fundamental liberty interests in their private consensual sexual choices. This fundamental protection is rooted in three well-recognized aspects of personal liberty – in intimate relationships, in bodily integrity, and in the privacy of the home. These aspects of liberty should not be viewed as "a series of isolated points," but are part of a "rational continuum" that constitutes the full scope of liberty of a free people. *Casey*, 505 U.S. at 848 (quotation marks omitted); *see also Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed"). Sexual intimacy marks an intensely personal and vital part of that continuum.

The Court has recognized that "choices to enter into and maintain certain intimate human relationships must be secured

against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). "[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Id.* at 619; *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545-46 (1987).

The adult couple whose shared life includes sexual intimacy is undoubtedly one of the most important and profound forms of intimate association. The Court has rightly recognized that regulation of the private details of sexual relations between two adults sharing an intimate relationship has "a maximum destructive impact upon that relationship." *Griswold*, 381 U.S. at 485. *Griswold* struck down a law that intruded directly into a married couple's private sexual intimacy – and thus their intimate relationship – by criminalizing the use of contraceptives and allowing intercourse only if accompanied by the risk of pregnancy. *Id.* at 485-86. Since *Griswold*, the Court has recognized that all adults, regardless of marital status or other facets of their relationship, have the same interest in making their own intimate choices in this area. *See Eisenstadt*, 405 U.S. at 453 ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person") (emphasis in original); *Casey*, 505 U.S. at 898 ("The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power"); *id.* at 852 (reaffirming *Eisenstadt* and *Griswold*).

Sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973). One's sexual orientation, the choice of

one's partner, and whether and how to connect sexually are profound attributes of personhood where compulsion by the State is anathema to liberty. *Cf. Casey*, 505 U.S. at 851.[8] Thus, the essential associational freedom here is the freedom to structure one's own private sexual intimacy with another adult. Section 21.06 utterly destroys that freedom by forbidding most sexual behavior for all same-sex couples, whether they are in a committed, long-standing relationship, a growing one, or a new one.

State regulation of sexual intimacy also implicates the liberty interest in bodily integrity. "It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about . . . bodily integrity." *Casey*, 505 U.S. at 849 (citations omitted); *see also id.* at 896 ("state regulation . . . is doubly deserving of scrutiny . . . [where] the State has touched not only upon the private sphere of the family but upon the very bodily integrity of the pregnant woman"). Stated generally, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." *Glucksberg*, 521 U.S. at 777 (Souter, J., concurring) (quotation marks omitted); *see also id.* at 720; *Rochin v. California*, 342 U.S. 165, 166, 173-74 (1952); *Cruzan*, 497 U.S. at 278.

Control over one's own body is fundamentally at stake in sexual relations, involving as they do the most intimate physical interactions conceivable. Like the decision whether to continue or terminate a pregnancy, or the decision whether to permit or decline medical procedures, the physical, bodily dimensions of how two persons express their sexuality in intimate relations are profoundly personal. Indeed, consent is a critically important dividing line in legal and societal views about sexuality for the

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[8] For many adults in modern society, sexual intimacy is an important aspect of forming or building a committed relationship where one does not already exist. *See Roberts*, 468 U.S. at 618 (Constitution protects "the *formation* and preservation" of "highly personal relationships") (emphasis added); Richard A. Posner, *Sex and Reason* 349 (1992) ("Consensual sex in whatever form is as we know a method of cementing a relationship").

very reason that individual control over sexual activity is of fundamental importance to every person's autonomy. Texas invades the liberty interest in bodily integrity by dictating that citizens may not share sexual intimacy unless they perform acts approved by the legislature, and by attempting to coerce them to select a sexual partner of the other sex.

The liberty interest at issue here also involves the deeply entrenched interest in the privacy of the home. "In the home, [the Court's] cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (emphasis in original); *Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (overnight guest receives protection under "everyday expectations of privacy that we all share"). The importance of shielding the home from intrusion goes beyond the Fourth Amendment. In *Frisby v. Schultz*, 487 U.S. 474 (1988), for example, the Court relied on the constitutional status of the home in rejecting a First Amendment challenge to an ordinance against picketing targeted at a home. *Id.* at 484 ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society") (quotation marks omitted). And constitutional protection for the home was an important consideration in *Griswold* itself. *See* 381 U.S. at 485 (rejecting intrusion into "sacred precincts of marital bedrooms"). "[I]f the physical curtilage of the home is protected, it is surely as a result of the solicitude to protect the privacies of the life within." *Poe v. Ullman*, 367 U.S. 497, 551 (1961) (Harlan, J., dissenting); *see also Stanley v. Georgia*, 394 U.S. 557 (1969).

Even without actual physical entry by the police, Section 21.06 directly invades the privacy of the home by criminalizing the private intimate conduct taking place there. *Poe*, 367 U.S. at 549, 551-52 (Harlan, J., dissenting). But this case also graphically illustrates how laws criminalizing consensual adult sexual intimacy permit invasion of the privacy of the home in the starkest sense. Although Petitioners do not challenge the lawfulness of the police entry into Lawrence's home in response to a report

of an armed gunman, the officers did not withdraw after discovering the report was false. Instead, under license of Section 21.06, they multiplied their intrusion exponentially by scrutinizing the specific intimate acts in which Petitioners were involved, arresting them, hauling them off to jail, and charging them with a crime for which they were later convicted.

Denying the existence of a liberty interest in private consensual adult sexual activity would give constitutional legitimacy to the grossest forms of intrusion into the homes of individuals and couples. To investigate this "criminal" conduct, the police could use every investigative method appropriate when ordinary criminal activity, such as drug use or distribution, occurs in the home: obtaining warrants to search for physical evidence of sexual activity; interrogating each member of the couple about the intimate details of the relationship; and surveillance, wiretaps, confidential informants, and questioning of neighbors. That these routine police methods are so repugnant and unthinkable in the context of adult consensual sexual relations is a strong indication that the conduct at issue differs in a fundamental way from ordinary criminal conduct that happens to occur in the home. *Cf. Romer*, 517 U.S. at 645 (Scalia, J., dissenting) ("'To obtain evidence [in sodomy cases], police are obliged to resort to behavior which tends to degrade and demean both themselves personally and law enforcement as an institution'") (quoting Kadish, *The Crisis of Overcriminalization*, 374 Annals of Am. Acad. of Pol. & Soc. Sci. 157, 161 (1967)).[9]

The core liberty interests at stake in this case are a bulwark against an overly controlling and intrusive government. The "fundamental theory of liberty upon which all governments in

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[9] The argument here in no way implies that ordinary criminal conduct may find refuge in the home. In the present context, "the privacy of the home is constitutionally protected not only because the home is seen as a sanctuary, privileged against prying eyes, but also because it is the place where most intimate associations are centered." Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 634 (1980) (footnote omitted); *see also Poe*, 367 U.S. at 551 (Harlan, J., dissenting) ("[t]he home derives its pre-eminence as the seat of family life").

this Union repose excludes any general power of the state to standardize," *Pierce*, 268 U.S. at 535, or "to coerce uniformity," *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

> The right of privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives.... People do not meaningfully govern themselves if their lives are . . . molded into standard, rigid, normalized roles.

Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 783, 804-05 (1989).

2. There Is No Constitutional Exception to Liberty for Gay and Lesbian Citizens.

Gay and lesbian Americans have the same liberty interests as heterosexuals in private consensual sexual intimacy free from unwarranted intrusion by the State. Gay adults, like their heterosexual counterparts, have vital interests in their intimate relationships, their bodily integrity, and the sanctity of their homes. Today, family lives centered on same-sex relationships are apparent in households and communities throughout the country. Likewise, the special interplay between the privacy of the home and individual decisions about sexual expression applies to lesbians and gay men as it does to others.

A gay or lesbian sexual orientation is a normal and natural manifestation of human sexuality. A difference in sexual orientation means a difference only in that one personal characteristic. Mental health professionals have universally rejected the erroneous belief that homosexuality is a disease. For example, in 1973 the American Psychiatric Association concluded that "homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[10] For gay adults, as for heterosexual ones, sexual

[10] *Resolution of the American Psychiatric Ass'n* (Dec. 15, 1973), 131 Am. J. Psychiatry 497 (1974); *accord* American Psychological Ass'n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633

expression is integrally linked to forming and nurturing the close personal bonds that give humans the love, attachment, and intimacy they need to thrive. *See, e.g.*, Lawrence A. Kurdeck, *Sexuality in Homosexual and Heterosexual Couples, in Sexuality in Close Relationships* 177-91 (K. McKinney & S. Sprecher eds., 1991); Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 119-20 (2000). "[M]ost lesbians and gay men want intimate relationships and are successful in creating them. Homosexual partnerships appear no more vulnerable to problems and dissatisfactions than their heterosexual counterparts." Letitia A. Peplau, *Lesbian and Gay Relationships, in Homosexuality* 177, 195 (J. Gonsiorek & J. Weinrich eds., 1991). Same-sex relationships often last a lifetime, and provide deep sustenance to each member of the couple. *See, e.g.*, A. Steven Bryant & Demian, *Relationship Characteristics of American Gay and Lesbian Couples*, 1 J. Gay & Lesbian Soc. Servs. 101 (1994).

That gay Americans have exactly the same vital interests as all others in their bodily integrity and the privacy of their homes is so plain that it appears never to have been disputed in the law. In contrast, the vital liberty interest that gay adults have in their intimate relationships has not always been recognized. Even a few decades ago, intense societal pressure, including many anti-gay government measures, ensured that the vast majority of gay people hid their sexual orientation – even from their own parents – and thus hid the important intimate relationships that gave meaning to their lives. *See infra* Point II.B.2. Lesbians and gay men, moreover, were falsely seen as sick and dangerous. *See infra* at 46. As recently as 1986, it was still possible not to perceive the existence and dignity of the families formed by gay adults. *See, e.g., Bowers*, 478 U.S. at 191, 195.

Today, the reality of these families is undeniable. The 2000 United States Census identified more than 600,000 households

(1975); National Ass'n of Social Workers, *Policy Statement on Lesbian and Gay Issues, reprinted in* Nat'l Ass'n of Social Workers, *Social World Speaks: NASW Policy Statements* 162, 162-65 (3d ed. 1994).

of same-sex partners nationally, including almost 43,000 in Texas. These families live in 99.3% of American counties.[11] Many state and local governments and thousands of private employers have adopted domestic partner benefits or more extensive protections for same-sex couples.[12] Virtually every State permits gay men and lesbians to adopt children individually, jointly and/or through "second-parent adoptions" that are analogous to stepparent adoptions. *See, e.g., Lofton v. Kearney*, 157 F. Supp. 2d 1372, 1374 n.1 (S.D. Fla. 2001) (observing that Florida is currently "the only state" "to statutorily ban adoption by gay or lesbian adults"); American Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.12 cmt. f, at 312 (2002). These and other legal doctrines have secured parental bonds for many of the estimated millions of children in the United States with gay parents. Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341, 341 & n.1 (Feb. 2002) (estimating one to nine million children with at least one lesbian or gay parent); *see also, e.g., T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) (allowing claim for partial custody by lesbian second parent under *in loco parentis* doctrine).

The reality of these families cannot be disregarded just because they do not match the "nuclear" model of a married couple with their biological children. *See, e.g., Troxel*, 530 U.S. at 63 ("The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household"); *id.* at 85 (Stevens, J., dissenting); *id.* at 98-101 (Kennedy, J., dissenting); *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.3 (1989) (plurality opinion) ("The family unit accorded traditional respect in our society . . . includes

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[11] *See* William B. Rubenstein, *et al.*, *Some Demographic Characteristics of the Gay Community in the United States* 3 (Table 1), 5 (Williams Project, UCLA School of Law 2003), *available at* http://www1.law.ucla.edu/~erg/pubs/GD/GayDemographics.pdf (accessed Jan. 15, 2003).

[12] *See Employers That Offer Domestic Partner Health Benefits, available at* http://www.hrc.org/worknet/dp/index.asp (accessed Jan. 15, 2003).

the household of unmarried parents and their children"). For gay men and lesbians, their family life – their intimate associations and the homes in which they nurture those relationships – is every bit as meaningful and important as family life is to heterosexuals.

Thus, the liberty interest at issue here should not be defined in terms of sexual orientation as the "right of homosexuals to engage in acts of sodomy," *Bowers*, 478 U.S. at 191, or reduced in value on that account. If heterosexual adults have a fundamental interest in consensual sexual intimacy, including the choice to engage in oral or anal sex, then so too must homosexual adults. The Due Process Clause itself does not distinguish among classes of citizens, extending the Constitution's shield to the highly personal associations and choices of some, but not protecting the very same associations and choices for others. These liberties are important to and protected for all Americans.

3. Objective Considerations Support Recognition of Fundamental Interests Here.

To ensure that its decisions in this area are firmly grounded, the Court has sought objective guideposts for the recognition of fundamental liberties. *See County of Sacramento v. Lewis*, 523 U.S. 833, 857-58 (1998) (Kennedy, J., concurring, joined by O'Connor, J.) (emphasizing that "objective considerations," including but not limited to "history and precedent," determine substantive due process interests). As just discussed, this Court's precedents and our constitutional structure indicate that the personal liberty protected by the Constitution must include adults' private choices about sexual intimacy. Foremost among other guideposts has been the history of legislation concerning the matter at hand, from prior centuries through the present. *See, e.g., Glucksberg*, 521 U.S. at 710-19.

In reviewing relevant legal traditions, the Court has made clear that protected liberty interests are not limited to those explicitly recognized when the Fourteenth Amendment was ratified. *Casey*, 505 U.S. at 847, 850 ("such a view would be

inconsistent with our law"); *Rochin*, 342 U.S. at 171-72 ("To believe that . . . judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges"). Abundant examples exist of the Court giving meaning to contemporary truths about freedom, where earlier generations had failed to acknowledge and specify an essential aspect of liberty. *See, e.g., Turner v. Safley*, 482 U.S. 78, 94-99 (1987); *Roe*, 410 U.S. at 152-53; *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold*, 381 U.S. at 482-85; *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399-400. *See generally Casey*, 505 U.S. at 847-48.

Similarly, in cases *rejecting* asserted liberty interests, the Court's decisions have never rested on past legal history alone. Because constitutional "tradition is a living thing," *Casey*, 505 U.S. at 850 (quotation marks omitted), the Court has always deemed it essential that the relevant legal tradition have continuing vitality today. In *Glucksberg*, for example, the Court rejected the claimed liberty interest in doctor-assisted suicide based not only on the common law's criminalization of assisted suicide, but also on the fact that "the States' assisted-suicide bans have in recent years been reexamined and, generally" – with a single exception – "reaffirmed." 521 U.S. at 716; *see also Michael H.*, 491 U.S. at 127. Even in *Bowers*, the Court looked not only to criminal laws concerning sodomy in 1787 and 1868, but also to the fact that half the States continued to outlaw such conduct in 1986. 478 U.S. at 192-94.[13]

[13] The Court has repeatedly rejected the notion that fundamental rights encompass only those recognized at "the most specific level" at the time the Fourteenth Amendment was adopted. *Casey*, 505 U.S. at 847-59; *Michael H.*, 491 U.S. at 132 (O'Connor, J., joined by Kennedy, J., concurring in part) (the Court's cases have discussed "asserted rights at levels of generality that might not be 'the most specific level' available"). While the Court has sought carefully to describe fundamental liberty interests, as Petitioners do in this case, careful description means neither restriction to the most specific level nor limitation to historically recognized rights. Moreover, to the extent the Court prefers to characterize the asserted right parallel to the historical legal treatment, laws regulating consensual sex between adults,

Over the last half century, the Nation has firmly broken from its prior legal tradition of criminalizing many adult choices about private sexual intimacy. Even before 1960, however, the relevant legal tradition is more complicated than an initial examination might reveal. *Bowers* observed that when the Fourteenth Amendment was ratified, 32 of 37 States had criminal laws against sodomy. 478 U.S. at 192-93. But a critical feature of those 19th-century and earlier laws was not discussed by the *Bowers* majority: Almost without exception, such laws historically have applied to certain specified sex acts without regard to whether same-sex or different-sex couples were involved. *See, e.g.*, Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 Yale L.J. 1073, 1082-86 (1988).[14] In addition, actual prosecutions for *private* intimacy have been exceedingly rare since the Nation's founding. *See* John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 66-67 (1988). And the scope of the specific sexual conduct covered has varied over time. *See, e.g.*, Goldstein, 97 Yale L.J. at 1085-86.

Texas law is a case in point. A Texas statute adopted in 1860 penalized "the abominable and detestable crime against nature" for all persons, Tex. Pen. Code art. 342 (1860); *supra* note 2, and an amendment in 1943 extended that ban to oral sex for all persons, 1943 Tex. Gen. Laws ch. 112, § 1. *See supra* at 5. Only in 1973 did Texas – like a handful of other States in the same period – replace its general ban with one that singled out the sexual intimacy of same-sex couples for criminal prohibition.

and state decisions to abolish such regulation, have almost always been written generally – *not* specifically to apply only to same-sex relationships.

[14] In 1868, at most three of the 32 States with sodomy prohibitions limited them to sexual conduct between two men; even in those three States, however, there is some uncertainty whether heterosexual couples were also covered. *See* Goldstein, 97 Yale L.J. at 1084 nn.60 & 66. Statutes using the word "mankind" frequently included sexual relations between men and women, as was the case in Texas. *See Lewis*, 35 S.W. at 372 ("Woman is included under the term 'mankind'"). In any event, three of 37 States is no legal tradition.

1973 Tex. Gen. Laws ch. 399, §§ 1, 3.[15] Thus, our Nation has no longstanding legal tradition of defining permissible or prohibited sexual conduct in terms of sexual orientation. Rather, the tradition exemplified by actual legislation is one of facial neutrality. The few discriminatory laws singling out lesbians and gay men show the divide that existed in the 1970s and 1980s between the majority's view of its own liberties and its lingering anti-gay attitudes.

Most importantly, however, both evenhanded and discriminatory bans on private sexual conduct between consenting adults have been rejected in contemporary times. Since the 1960s, there has been a steady stream of repeals and state judicial invalidations of laws criminalizing consensual sodomy and fornication.[16] "The unmistakable trend . . . nationally . . . is to curb government intrusions at the threshold of one's door and most definitely at the threshold of one's bedroom." *Jegley v. Picado*,

[15] *See also* 1977 Ark. Acts 828 (struck down by *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002)); 1969 Kan. Sess. Laws ch. 180, *codified at* Kan. Stat. Ann. § 21-3505; 1974 Ky. Laws ch. 406 (struck down by *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)); 1977 Mo. Laws sec. 1, § 566.090, *codified at* Mo. Rev. Stat. § 566.090; 1973 Mont. Laws ch. 513 (struck down by *Gryczan v. State*, 942 P.2d 112 (Mont. 1997)); 1977 Nev. Stat. ch. 598 (repealed by 1993 Nev. Stat. ch. 236); 1989 Tenn. Pub. Acts ch. 591 (struck down by *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996)).

[16] "With nonmarital sex so utterly commonplace, the word *fornication*, with its strong pejorative connotation, has virtually passed out of the language." Posner, *Sex and Reason* 55 (emphasis in original). Likewise, "sodomy" is a term now used rarely outside legal contexts, while oral sex and anal sex are openly discussed in the media and society.

Consensual sodomy and fornication have been the *only* criminal laws in American history where the State has acted solely to limit forms of intimacy by consenting adults. Other crimes relating to sexuality have included additional elements reflecting other state concerns. Adultery and bigamy laws, for example, aim to enforce the legal marriage contract. Incest and under-age sex laws, *inter alia*, seek to protect vulnerable individuals who may not be capable of true consent. Prostitution and public-sex laws address commercial or public interactions that have a negative impact on the larger community. This case concerns the narrow but important freedom to choose the expressions of sexual intimacy one shares with another adult partner in private, and does not challenge these other types of State regulation.

80 S.W.3d 332, 356 (Ark. 2002) (Brown, J., concurring). By 1986, when *Bowers* was decided, 26 States had already removed consensual sodomy laws from their criminal codes. *See* 478 U.S. at 193-94. Today, only 13 States still have such prohibitions.[17] Moreover, of those 13 States, Texas and the three others that have discriminatory rules have eliminated criminal prohibitions in this area for the vast majority of adult couples. Similarly, only six States and the District of Columbia still criminalize fornication.[18] In contrast, when *Loving* was decided in 1967, 16

[17] Repeal or invalidation of same-sex-only sodomy laws since *Bowers*: 1993 Nev. Stat. ch. 236 (repealing Nev. Rev. Stat. § 201.193); *Jegley*, 80 S.W.3d 332 (Ark.); *Wasson*, 842 S.W.2d 487 (Ky.); *Gryczan*, 942 P.2d 112 (Mont.); *Campbell*, 926 S.W.2d 250 (Tenn.).

Repeal or invalidation of facially evenhanded sodomy laws since *Bowers*: 2001 Ariz. Legis. Serv. 382 (West) (repealing Ariz. Rev. Stat. §§ 13-1411, 13-1412); 1993 D.C. Laws 10-14 (amending D.C. Stat. § 22-3502 to exclude private consensual adult conduct); 1998 R.I. Pub. Laws 24 (amending R.I. Gen. Laws § 11-10-1 to exclude conduct with other persons); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Williams v. State*, No. 98036031/CL-1059, 1998 Extra LEXIS 260 (Md. Cir. Ct. Balt. City Oct. 15, 1998); *Michigan Org. for Human Rights v. Kelley*, No. 88-815820 CZ (Mich. Cir. Ct. Wayne County July 9, 1990); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. May 15, 2001). In Maryland, Michigan, and Minnesota, the States did not appeal the lower court decisions striking down the laws.

One state high court upheld a sodomy law against a constitutional challenge in recent years. *See State v. Smith*, 766 So. 2d 501 (La. 2000).

[18] As with sodomy laws, fornication laws have been struck down as contrary to the right of privacy protected by state constitutions. *See, e.g., In re J.M.*, No. SO2A1432, 2003 WL 79330 (Ga. Jan. 13, 2003) (invalidating Ga. Code Ann. § 16-6-18). The fornication laws remaining in seven jurisdictions criminalize any act of sexual intercourse between unmarried persons. *See* D.C. Stat. Ann. § 22-1602; Idaho Code § 18-6603; Mass. Gen. Laws ch. 272, § 18; *id.* ch. 277 § 39; Minn. Stat. § 609.34; Utah Code Ann. § 76-7-104; Va. Code Ann. § 18.2-344; W. Va. Code § 61-8-3. Seven other States, although purporting in some cases to proscribe "fornication," prohibit a narrower category of sexual intercourse between unmarried persons, such as where it is "open and notorious," 720 Ill. Comp. Stat. 5/11-8; N.D. Cent. Code § 12.1-20-10, or where the parties cohabit or engage in habitual intercourse, Fla. Stat. Ann. § 798.02; Mich. Comp. Laws Ann. § 750.335; Miss. Code Ann. § 97-29-1; N.C. Gen. Stat. § 14-184; S.C. Code Ann. §§ 16-15-60, 16-15-80. *See generally* Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* 99-102 (1996) (summarizing criminal fornication and cohabitation laws;

States still had criminal laws against interracial marriage. *Loving*, 388 U.S. at 6 n.5; *see also id.* at 12 (holding that such laws violate fundamental liberty).

The "consistency of the direction of change" among the States, *Atkins v. Virginia*, 122 S. Ct. 2242, 2249 (2002), is indicative of a strong national consensus reflecting profound judgments about the limits of government's intrusive powers in a civilized society. The principles and sentiments that have led the States to eliminate these laws are yet another objective indicator of the fundamental interests at stake. For example, when the Georgia Supreme Court struck down, under the state constitution, the very law upheld by this Court in *Bowers*, it stated: "We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity." *Powell v. State*, 510 S.E.2d 18, 24 (Ga. 1998); *accord, e.g., Gryczan v. State*, 942 P.2d 112, 122 (Mont. 1997) ("all adults regardless of gender, fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation"); *Campbell v. Sundquist*, 926 S.W.2d 250, 261 n.9 (Tenn. App. 1996) ("Infringement of such individual rights cannot be tolerated until we tire of democracy and are ready for communism or a despotism"); *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980) ("regulat[ing] the private [sexual] conduct of consenting adults . . . exceeds the valid bounds of the police power"); *State v. Ciuffini*, 395 A.2d 904, 908 (N.J. Super. Ct. App. Div. 1978) (because consensual sodomy law only "serves as an official sanction of certain conceptions of desirable lifestyles, social mores, or individualized beliefs, it is not an appropriate exercise of the police power"). Legislative repeals reflect the same deep-seated values. As Governor Jane Hull said when signing the bill repealing Arizona's sodomy law, "At the end of the day, I returned to one of my most basic beliefs about government – It does not belong in our private lives." Howard Fischer, *Hull*

Arizona's and New Mexico's laws cited therein were since repealed, *see* 2001 Ariz. Legis. Serv. ch. 382, § 1 (West); 2001 N.M. Laws ch. 32).

OKs Repeal of 'Archaic' Sex Laws, Ariz. Daily Star, May 9, 2001, at A1.

A final confirmation underscoring that America has repudiated a role for government as enforcer of permitted forms of intimacy is the virtually non-existent enforcement today of the laws that still are on the books. In the 13 States that still proscribe sodomy, the laws are almost never enforced in criminal proceedings against private consensual intimacy. *See Bowers*, 478 U.S. at 198 n.2 (Powell, J., concurring) ("prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades"); *Morales*, 826 S.W.2d at 203 ("The State concedes that it rarely, if ever, enforces § 21.06"). But as this rare case of prosecution vividly demonstrates, the laws remaining on the books still sometimes strike like lightning, causing the grossest of governmental invasions of privacy through criminal enforcement. The Court should recognize the liberty interests that Petitioners and all Americans have in being free from such invasions.

B. Texas Cannot Justify Section 21.06's Criminal Prohibition of Petitioners' and Other Adults' Private Sexual Intimacy.

Recognition of the fundamental liberty interest at stake here does not end the inquiry, for due regard must also be given to any countervailing interests the State may have and the means used to achieve them. The Court has rejected rigid or mechanical tests in this area. Rather, it has given careful consideration to any weighty governmental interests that stand opposed to a fundamental liberty interest, and has looked closely at the degree and nature of the burden on the liberty interest, before ruling on the ultimate question of constitutionality. *See, e.g., Casey*, 505 U.S. at 849-51 (opinion of Court); *id.* at 871-79 (plurality opinion of O'Connor, Kennedy, and Souter, JJ.); *Troxel*, 530 U.S. at 73 (plurality opinion); *id.* at 101-02 (Kennedy, J., dissenting); *Cruzan*, 497 U.S. at 280-81.

Here, however, there is no countervailing State interest remotely comparable to those weighed by this Court in other recent cases involving fundamental liberties, such as the State's interests in protecting the potentiality of human life, *Casey*, 505 U.S. at 871-79 (opinion of O'Connor, Kennedy, and Souter, JJ.), in protecting the welfare of children, *see Troxel*, 530 U.S. at 73 (plurality opinion), or in protecting and preserving existing human life, *Cruzan*, 497 U.S. at 280-81. *See also Glucksberg*, 521 U.S. at 728-35 (reviewing numerous "important and legitimate" interests furthered by ban on assisted suicide).

In stark contrast to those cases, counsel for Texas has conceded that Section 21.06 furthers no compelling state interest. Pet. App. 76a. The sole justification urged throughout this litigation by the State is the majority's desire to espouse prevailing moral principles and values. *See, e.g.*, State's Br. in Supp. of Reh'g En Banc 16. The State claims no distinct harm or public interest other than a pure statement of moral condemnation. This Court, however, has never allowed fundamental freedoms to be circumscribed simply to enforce majority preferences or moral views concerning deeply personal matters. *See, e.g., Casey*, 505 U.S. at 850-51. Indeed, the discriminatory moral standard employed in the Homosexual Conduct Law is illegitimate under the Equal Protection Clause. *See infra* Point II.

In arriving at the constitutional balance, the Court must also consider that Texas is using "the full power of the criminal law." *Poe*, 367 U.S. at 548 (Harlan, J., dissenting). Section 21.06 empowered the police to inspect closely Lawrence and Garner's intimate behavior in Lawrence's home and haul them off to jail. Although prosecutions may be rare and wholly arbitrary, this case shows that the criminal penalties of such laws are on occasion enforced. Criminal sanctions always impose an extreme burden.

Lawrence and Garner were arrested and held in custody for more than a day – a humiliating invasion of personal dignity. "A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief.... And once the period of custody is over, the fact of the

arrest is a permanent part of the public record." *Atwater v. City of Lago Vista*, 532 U.S. 318, 364-65 (2001) (O'Connor, J., dissenting). Petitioners now each have a criminal conviction for private consensual sexuality. This "finding of illegality is a burden by itself. In addition to a declaration of illegality and whatever legal consequences flow from that, the finding also poses the threat of reputational harm that is different and additional to any burden posed by other penalties." *BE&K Constr. Co. v. NLRB*, 122 S. Ct. 2390, 2398 (2002).

Moreover, "[t]he Texas courts have held that the crime of homosexual conduct ... is a crime involving moral turpitude." *In re Longstaff*, 538 F. Supp. 589, 592 (N.D. Tex. 1982) (citation omitted), *aff'd*, 716 F.2d 1439 (5th Cir. 1983). Petitioners' convictions therefore disqualify or restrict Lawrence and Garner from practicing dozens of professions in Texas, from physician to athletic trainer to bus driver.[19] In four states, Lawrence and Garner are considered sex offenders and would have to register as such with law enforcement.[20] And while Section 21.06 does not authorize imprisonment as a penalty, prison terms can be imposed in the 12 other States with sodomy prohibitions, in some cases up to ten years.[21]

Even where there is no direct enforcement, Section 21.06

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[19] *See, e.g.*, Tex. Occ. Code § 164.051(a)(2)(B) (physician); *id.* § 301.409(a)(1)(B) (registered nurse); *id.* § 401.453(a) (speech-language pathologist); *id.* § 451.251(a)(1) (athletic trainer); *id.* § 1053.252(2) (interior designer); *id.* § 2001.102 (bingo licensee); Tex. Transp. Code § 512.022(f) (school bus driver); Tex. Alco. Bev. Code § 11.46(a)(3) (liquor sales).

[20] *See* Idaho Code § 18-8304; La. Rev. Stat. Ann. § 15:541; Miss. Code Ann. § 45-33-23; S.C. Code Ann. § 23-3-430.

[21] *See* Ala. Code §§ 13A-6-60(2), 13A-5-7(a)(1) (one year); Fla. Stat. Ann. §§ 800.02, 775.082(4)(b) (60 days); Idaho Code § 18-6605 (five years); Kan. Stat. Ann. §§ 21-3505, 21-4502(1)(b) (six months); La. Rev. Stat. Ann. 14:89 (five years); Miss. Code Ann. 97-29-59 (ten years); Mo. Rev. Stat. §§ 566.090, 558.011 (one year); N.C. Gen. Stat. §§ 14-177, 15A-1340.17 (one year); Okla. Stat. tit. 21, § 886, *amended by* 2002 Okla. Sess. Law Serv. ch. 460, § 8 (West) (ten years); S.C. Code Ann. § 16-15-120 (five years); Utah Code Ann. §§ 76-5-403(1), 76-3-204(2) (6 months); Va. Code Ann. §§ 18.2-361, 18.2-10 (five years).

intrudes into the privacy of innumerable homes by regulating the actual physical details of how consenting adults must conduct their most intimate relationships. As discussed above, *see supra* Point I.A., such an invasion starkly offends the fundamental freedom of adulthood that is at stake. The Homosexual Conduct Law's absolute criminal ban is a harsh burden for all covered by the law.

The balance in this case thus heavily favors individual liberty. Texas's justification – amounting to a mere declaration that the State disapproves of same-sex couples engaging in the conduct at issue, in the absence of any asserted public need or harm – cannot be sufficient. *See Casey*, 505 U.S. at 850-53; *Roe*, 410 U.S. at 162; *Poe*, 367 U.S. at 548 (Harlan, J., dissenting). If it were, the power of the government to restrict liberty interests would be unlimited. The very meaning of fundamental liberty interests is that this kind of decision – affecting the most personal and central aspects of one's life – should be made by the individual, not the State.

While Texas may advocate a majority view about sexual morality, it may not excessively burden the liberty interests of those citizens who profoundly disagree. *See, e.g., Maher v. Roe*, 432 U.S. 464, 475-76 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity . . . . Constitutional concerns are greatest when the State attempts to impose its will by force of law"). Texas may not impose its particular view through the intrusive force of a criminal law regulating the very forms of physical intimacy that consenting adults may choose in the privacy of their own homes. By claiming the power to impose its own moral code where constitutional guarantees of personal liberty are at stake, Texas is reversing the proper relationship between the government and a free people.

The Court long ago made clear that the Constitution "excludes any general power of the state to standardize its children" because "[t]he child is not the mere creature of the state." *Pierce*, 268 U.S. at 535; *accord Troxel*, 530 U.S. at 68 (plurality opinion). Yet, what

Texas claims here is the power to standardize its adult citizens and render them mere creatures of the State by compelling conformity in the most private and intimate personal matters. By vote of the majority, one particular view of how to conduct one's most private relationships is imposed on all. But "fundamental rights may not be submitted to vote; they depend on the outcome of no election." *Barnette*, 319 U.S. at 638. The precepts advocated by Texas, aimed at "submerg[ing] the individual," are "wholly different from those upon which our institutions rest." *Meyer*, 262 U.S. at 402. Section 21.06 unjustifiably infringes the personal liberty and privacy guaranteed by the Constitution and should be struck down.

C. *Bowers* Should Not Block Recognition and Enforcement of These Fundamental Interests.

Vindication of Petitioners' constitutionally protected liberty interests should not be blocked by continued adherence to *Bowers*. In light of the fundamental interests at stake and the consistent and profound legal, political, and social developments since *Bowers*, principles of *stare decisis* do not bar the Court's reconsideration of that decision.

Stare decisis is a "principle of policy," not an "inexorable command." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (quotation marks omitted); *see also, e.g., Agostini v. Felton*, 521 U.S. 203, 235-36 (1997) (same). That is "particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Seminole Tribe*, 517 U.S. at 63 (quotation marks omitted). For these reasons, the Court has not hesitated to overrule earlier constitutional decisions that have been recognized as erroneous. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 828 & n.1 (1991) (surveying cases); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J.S. Ct. Hist. 13 (same).

Where, as here, a prior decision has erroneously *denied* a fundamental constitutional right of citizens over and against the State and no countervailing rights of other individuals are at stake, there is a compelling need to correct the error. *See, e.g.,*

Barnette, 319 U.S. at 630-42 (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)); *see also, e.g., Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). That is especially true here, because laws of the kind upheld by *Bowers* – whether facially evenhanded or discriminatory – are used to legitimize widespread discrimination against gay and lesbian Americans. *See infra* Point II.B.1. Indeed, the holding of *Bowers* itself has been cited as justifying state-sponsored discrimination. *See, e.g., Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the Court [in *Bowers*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open . . . to conclude that state sponsored discrimination against the class is invidious"); *Romer*, 517 U.S. at 641 (Scalia, J., dissenting) (same).

In this respect *Bowers* is fundamentally different from decisions like *Roe* or *Miranda v. Arizona*, 384 U.S. 436 (1966), which recognized individual rights that then became incorporated into the very fabric of our society. *See Casey*, 505 U.S. at 854; *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Indeed, there are no considerations like those identified in *Casey* or other *stare decisis* cases that might favor continued adherence to *Bowers*.

Unlike the right recognized in *Roe* and its progeny, there is no pattern of individuals who "have relied reasonably on the [*Bowers*] rule's continued application" to their advantage, *Casey*, 505 U.S. at 855; *see also, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 233 (1995). Individuals have only been harmed by the *Bowers* decision. Nor has *Bowers* become "part of our national culture," *Dickerson*, 530 U.S. at 443. Just the opposite is true. Developments in the law and in the facts – or in society's perception of the facts, *see Casey*, 505 U.S. at 863 – have steadily eroded any support for *Bowers*. Since *Bowers*, the Nation has continued to reject the extreme intrusion into the realm of personal privacy approved in that case, so that now three-fourths of the States have repealed or invalidated such laws – including the very law upheld by *Bowers*. *See supra* Point I.A.3.

Also since *Bowers*, the Nation has steadily moved toward

rejecting second-class-citizen status for gay and lesbian Americans. In *Romer*, this Court held that venerable equal protection principles protect gay and lesbian Americans against invidious discrimination. Thirteen States and the District of Columbia, plus countless municipalities – including at least four in Texas – have now added sexual orientation to laws barring discrimination in housing, employment, public accommodations, and other areas.[22] More than half the States now have enhanced penalties for hate crimes motivated by the victim's sexual orientation.[23] And the reality of gay and lesbian couples and families with children has been increasingly recognized by the law and by society at large. *See supra* at 17-19. This is thus a case in which the Court must respond to basic facts and constitutional principles that the country has "come to understand already, but which the Court of an earlier day . . . had not been able to perceive." *Casey*, 505 U.S. at 863; *see also, e.g., Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (*stare decisis* must give way when necessary "to bring [the Court's] opinions into agreement with experience and with facts newly ascertained") (quotation marks omitted).

Bowers is an isolated decision that, like the cases overturned in *Payne*, was "decided by the narrowest of margins, over spirited dissents challenging [its] basic underpinnings." *Payne*, 501 U.S. at 828-29. Far from being "an essential feature of our legal tradition," *Mitchell v. United States*, 526 U.S. 314, 330 (1999), *Bowers* stands today as "a doctrinal anachronism discounted by society," *Casey*, 505 U.S. at 855. Many of the bedrock principles of

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[22] 1999 Cal. Legis. Serv. ch. 592 (West); 1991 Conn. Legis. Serv. 91-58 (West); Human Rights Act of 1977, D.C. Laws 2-38; 1991 Haw. Sess. Laws Act 2; 2001 Md. Laws ch. 340; 1989 Mass. Legis. Serv. ch. 516 (West); 1993 Minn. Sess. Law Serv. ch. 22 (West); 1999 Nev. Stat. ch. 410; 1997 N.H. Laws ch. 108; 1991 N.J. Sess. Law Serv. ch. 519 (West); 2002 N.Y. Laws ch. 2; 1995 R.I. Pub. Laws ch. 95-32; 1992 Vt. Acts & Resolves 135; 1981 Wis. Laws ch. 112; Austin, Tex., City Code, vol. I, tit. VII; Dallas, Tex., Mun. Ordinance 24927 (May 8, 2002); Fort Worth, Tex., Code of Ordinances ch. 17, art. III; Houston, Tex., City Code ch. 2, tit. XIV.

[23] *See* Nat'l Gay and Lesbian Task Force, *Hate Crime Laws in the U.S., available at* http://www.ngltf.org/downloads/hatecrimeslawsmap.pdf (accessed Jan. 14, 2003).

contemporary constitutional law were announced in cases overruling contrary precedent – whether after only a few intervening years, or following decades of legal, political, and social development. *See, e.g., Barnette*, 319 U.S. at 630; *Brown*, 347 U.S. at 494-95; *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Malloy v. Hogan*, 378 U.S. 1, 4-6 (1964). As in those cases, the Court "cannot turn the clock back." *Brown*, 347 U.S. at 492-93. It accordingly should overturn *Bowers* and protect the fundamental liberty interests of Petitioners.

II. Section 21.06 Discriminates Without Any Legitimate and Rational Basis, Contrary to the Guarantee of Equal Protection.

Texas's Homosexual Conduct Law violates the Fourteenth Amendment for the additional reason that it "singl[es] out a certain class of citizens for disfavored legal status," *Romer*, 517 U.S. at 633, in violation of the most basic requirements of the Equal Protection Clause. The statute directly conflicts with the Constitution's "commitment to the law's neutrality." *Id.* at 623. It fails equal protection scrutiny even under the deferential "rational basis" standard.[24] And this discriminatory classification is "embodied in a criminal statute . . . where the power of the State weighs most heavily," a context in which the Court "must be especially sensitive to the policies of the Equal Protection Clause." *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

By its terms, Section 21.06 treats the *same* consensual sexual behavior differently depending on *who* the participants are. The

[24] Heightened equal protection scrutiny is appropriate for laws like Section 21.06 that use a sexual-orientation-based classification. It is also appropriate where, as here, the law employs a gender-based classification to discriminate against gay people. The classification in this law, however, does not even have a legitimate and rational basis.

Of course, if the Court agrees with Petitioners that the challenged law invades a fundamental liberty, analysis of the law's discriminatory classification would be as stringent as the analysis outlined in Point I. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 337 (1972). In this Point II, Petitioners urge a distinct constitutional violation that does not depend on the Court finding that a fundamental liberty is at stake.

behaviors labeled "deviate sexual intercourse" by Texas are widely practiced by heterosexual as well as gay adults.[25] But the statute makes this common conduct illegal only for same-sex couples and not for different-sex ones. Tex. Pen. Code § 21.06. And the State offers only a tautological, illegitimate, and irrational purported justification for such discrimination.

The group targeted and harmed by the Homosexual Conduct Law is, of course, gay people. Gay people have a same-sex sexual orientation and heterosexuals have a different-sex one. *See, e.g.*, John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation, in Homosexuality: Research Implications for Public Policy* 1 (J. Gonsiorek & J. Weinrich eds., 1991) ("sexual orientation is erotic and/or affectional disposition to the same and/or opposite sex"); *cf. Romer*, 517 U.S. at 624, 626-31 (in civil rights laws, "sexual orientation" is defined by an individual's "choice of sexual partners" or "heterosexuality, homosexuality or bisexuality"). The Homosexual Conduct Law overtly uses that defining characteristic to set up its disparate treatment. Section 21.06 "prohibit[s] lesbians and gay men from engaging in the same conduct in which heterosexuals may legally engage." *Morales*, 826 S.W.2d at 204; *see also Wasson*, 842 S.W.2d at 502 (where same-sex but not different-sex sodomy is criminalized, "[s]exual preference, and not the act committed, determines criminality, and is being punished").

A straightforward application of the rational basis test shows that this law and Texas's attempted justification for it cannot satisfy the requirement that every classification must at least "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633. When broader realities and history are considered, as this Court appropriately does in any equal protection case, the constitutional violation is only magnified.

[25] *See, e.g.*, Edward O. Laumann *et al.*, *The Social Organization of Sexuality* 98-99 (1994) (comprehensive study by University of Chicago researchers of sexual practices of American adults, finding that approximately 79% of all men and 73% of all women had engaged in oral sex, and 26% of all men and 20% of all women had engaged in anal sex).

The Homosexual Conduct Law and its badge of criminality function to make gay people unequal in myriad spheres of everyday life and continue an ignominious history of discrimination based on sexual orientation. Ultimately, the equal protection and liberty concerns in this case reinforce one another, and further underscore that this unequal law and its broad harms are intolerable in this country.

A. Section 21.06's Classification Is Not Rationally Related to Any Legitimate Purpose and Serves Only the Illegitimate Purpose of Disadvantaging One Group.

"[C]onventional and venerable" principles require that legislative discrimination must, at a minimum, "bear a rational relationship to an independent and legitimate legislative end." *Romer*, 517 U.S. at 633, 635; *see also, e.g., Cleburne*, 473 U.S. at 446; *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981). This test is deferential, but meaningful.

> [E]ven in the ordinary equal protection case . . . , [the Court] insist[s] on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sort of laws it can pass; and it marks the outer limits of [the judiciary's] own authority.

Romer, 517 U.S. at 632.

Under the Equal Protection Clause, the *classification* – the different treatment of different people – is what must be justified. *See Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-67 (2001) (rational basis review searches for "distinguishing characteristics" between the two groups that are "relevant to interests the State has the authority to implement") (quotation marks omitted); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966) (equal protection "imposes a requirement of some rationality in the nature of the class singled out"); *McLaughlin*, 379 U.S. at 191 ("courts must reach and determine the question whether the

classifications drawn in a statute are reasonable in light of its purpose – . . . whether there is an arbitrary or invidious discrimination between those classes covered . . . and those excluded"). The classification must be rationally connected to an independent and permissible government objective to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

Section 21.06 fails that essential test. As the Supreme Court of Kentucky observed in striking down that State's discriminatory consensual sodomy law on state equal protection grounds:

> In the final analysis we can attribute no legislative purpose to this statute except to single out homosexuals for different treatment for indulging their sexual preference by engaging in the same activity heterosexuals are now at liberty to perform . . . . The question is whether a society that no longer criminalizes adultery, fornication, or deviate sexual intercourse between heterosexuals, has a rational basis to single out homosexual acts for different treatment.

Wasson, 842 S.W.2d at 501. That court found no "rational basis for different treatment," and emphasized that "[w]e need not sympathize, agree with, or even understand the sexual preference of homosexuals in order to recognize their right to equal treatment before the bar of criminal justice." *Id.*; *accord Jegley*, 80 S.W.3d at 353 ("[w]e echo Kentucky in concluding that 'we can attribute no legislative purpose to this statute except to single out homosexuals'"). That conclusion applies with equal force to the identical classification employed by Texas's law.

When Texas enacted Section 21.06 in the early 1970s, there was no "practical necessity" to draw a classification among its residents with regard to the subject matter of consensual, adult oral and anal sex. *Cf. Romer*, 517 U.S. at 631. For decades, the State had included an evenhanded prohibition on those acts within its criminal code. When the legislature determined that its old law was unduly intrusive, it had the obvious choice of repealing

it for *all* its citizens – as three-fourths of the States have done. *See supra* at 23 & note 17. Instead, it decided to single out same-sex couples for intrusive regulation and condemnation, and to free all heterosexual couples to make their own choices about particular forms of intimacy.

Throughout this litigation, the only justification that Texas has offered for this discriminatory classification is the moral judgment of the majority of its electorate. The State asserts that its "electorate evidently continues to believe" that the discriminatory line drawn by the Homosexual Conduct Law is desirable because it expresses the majority's moral views. Pet. Opp. 18.

The Homosexual Conduct Law's classification fails rational basis analysis, for several reasons. *First*, the State's position amounts to no "independent . . . legislative end" at all. *Cf. Romer*, 517 U.S. at 633. This "justification" merely restates that Texas believes in and wants to have this criminal law. The Equal Protection Clause requires that the State's classification serve a distinct legislative end – an objective or purpose – independent of the classification itself. There must be a "link between classification and objective," *id.* at 632, or "some relation between the classification and the purpose it serve[s]," *id.* at 633. The test would be meaningless – a mere rubberstamp for discrimination – unless the purpose is independent of the classification. But the "justification" offered by Texas is circular and not an independent objective served. In the words of the dissenters below, "[t]he contention that the same conduct is moral for some but not for others merely repeats, rather than legitimizes, the Legislature's unconstitutional edict." Pet. App. 44a.

The State's approach gives *carte blanche* to presumed majority sentiment, and leaves those targeted by a discriminatory law without recourse. If majority moral or value judgments were enough to answer an equal protection challenge, the amendment struck down in *Romer* would have survived, because the votes of a majority of Coloradans clearly signaled that including gay people within civil rights protections was antithetical to their

values. Instead, this Court recognized that Amendment 2 – like Section 21.06 here – was a "classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 517 U.S. at 635. Government "may not avoid the strictures of that Clause by deferring to the wishes or objections . . . of the body politic." *Cleburne*, 473 U.S. at 448.

Second, even if Texas's objective could somehow be characterized as independent of the classification, mere negative views about the disfavored group – "moral" or otherwise – are not a legitimate basis for legal discrimination. *Cleburne*, 473 U.S. at 448 ("mere negative attitudes . . . unsubstantiated by factors which are properly cognizable [by government] are not permissible bases" for discriminatory legal rules). This Court has many times repeated the core principle of rejecting bias, however characterized, in law: Legal distinctions may not give effect to the majority's desire to condemn an unpopular group, *see Moreno*, 413 U.S. at 534, the negative reactions of neighbors, *see Cleburne*, 473 U.S. at 448, the fears of people who are different, *see id.*, a reaction of discomfort toward a minority, *see O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *Cleburne*, 473 U.S. at 448-49, private prejudice, *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), or any other manifestation of unfounded animosity toward one group, *Romer*, 517 U.S. at 633-35. History unquestionably teaches that the moral views of a given time, just like fears, dislikes, and blatant prejudices, often reflect prevailing negative attitudes about different groups of people in society. *Cf. Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Men feared witches and burnt women"). Indeed, negative attitudes toward a group can always be recast in terms of a discriminatory moral code. Using a moral lens to describe negative attitudes about a group that are not tied to any distinct, objective and permissible factors cannot cleanse those bare negative attitudes of their illegitimacy in government decisionmaking.

Texas's approach of dictating that same-sex couples are "more 'immoral and unacceptable,'" Pet. Opp. 18, than heterosexual couples under the very same circumstances – if they choose any

of the behaviors defined as "deviate sexual intercourse" – must be rejected as impermissible. *Neutral, evenhanded* laws that truly restrict all persons in the same way could, if there were no fundamental interests at stake, be justified by a moral position. Here, however, Texas impermissibly attempts to impose a *discriminatory* moral code.[26] The State's law and its proffered justification embody a bald preference for those with the most common sexual orientation and dislike of a smaller group who are different. Texas simply wants to judge those with a same-sex sexual orientation more harshly for the same behavior.[27]

The Constitution and this Court's precedents forbid that. In *Palmore*, a mother lost custody of her child because her interracial "'life-style'" was "'unacceptable . . . to society.'" 466 U.S. at 431 (quoting investigator's report). But this Court emphatically held that such negative views have no place in the law. *Id.* at 433 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). Likewise, unequal treatment may not be based on archaic and unfounded negative attitudes toward a group, whether grounded in morality, religious conviction, or "nature." In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), for example, the Court stressed the need to set aside archaic ideas about gender, such as that women are "innately inferior" or that unique "'moral and social problems'" would arise if women tended bar or otherwise enjoyed equal opportunities. *Id.* at 725 & n.10.

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[26] *See* Pet. App. 70a-71a (Anderson, J., dissenting) ("[E]qual protection doctrine does not prevent the majority from enacting laws based on its substantive value choices. Equal protection simply requires that the majority apply its values evenhandedly. . . . The constitutional requirement of evenhandedness advances the political legitimacy of majority rule by safeguarding minorities from majoritarian oppression").

[27] This conclusion is reinforced by the fact that Texas's 1973 enactment discriminates against gay people whereas traditional morality did not. "[T]he practice of deviate sexual intercourse violates traditional morality. But so does the same act between heterosexuals, which activity is decriminalized. . . . The issue here is . . . whether [sexual activity traditionally viewed as immoral] can be punished solely on the basis of sexual preference." *Jegley*, 80 S.W.3d at 352 (quotation marks omitted).

Similarly, negative attitudes toward those with a particular personal characteristic – even where advanced with the toned-down patina of morality – are also not a legitimate justification for discrimination under rational basis scrutiny. In *Romer*, the Court refused to endorse the dissent's position that Amendment 2's anti-gay classification could be sustained as an attempt "to preserve traditional sexual mores," *Romer*, 517 U.S. at 636 (Scalia, J., dissenting). In *Moreno*, faced with a regulation that targeted the morally disfavored group of "hippies," the Court emphasized that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno*, 413 U.S. at 534. Instead, different treatment must be supported by "reference to [some independent] considerations in the public interest." *Id.* (alteration in original). Whether termed a moral judgment, fear, discomfort, or bias, "mere negative attitudes" about one subset of the diverse American population cannot justify distinctions in legal treatment. *See Cleburne*, 473 U.S. at 448.

Third, there is no other legitimate justification that can save this law. The distinction drawn by the Homosexual Conduct Law does not rationally further any permissible goal of the State. There are no valid concerns of the government here that correlate with sexual orientation, which is a deeply rooted personal characteristic that we all have. Variation among heterosexuals, homosexuals, and bisexuals has no "relevan[cy] to interests the State has the authority to implement," *Garrett*, 531 U.S. at 366, or to "factors which are properly cognizable," *Cleburne*, 473 U.S. at 448, in writing the criminal law. Thus, Section 21.06's line-drawing does not turn on or respond to any differences in maturity or age, in intent, or in the specifics of the actors' relationship, other than its same-sex or different-sex nature. It does not incorporate the use of force, a public location, or a commercial context in its elements, to address those types of important concerns. Indeed, Texas has other laws that criminalize sexual conduct that is non-consensual, or public, or commercial,

or with a minor. *See supra* at 6. Likewise, the law's discriminatory regulation of "deviate sexual intercourse" is unrelated to any interest in reproduction, for oral and anal sex are obviously not methods of reproduction for any couple.

Where government itself offers a reason that is illegitimate, as Texas has done here, or other factors indicate that the law rests on negative attitudes, the Court has carefully assessed any additional, purportedly rational and legitimate basis for challenged differential treatment. *See Cleburne*, 473 U.S. at 449-50 (careful assessment, and ultimate rejection, of other proffered reasons, where negative attitudes were clearly one basis for legal discrimination); *Moreno*, 413 U.S. at 535-38 (same). In such rational basis cases, the Court has not tried to supply new, "conceivable" reasons to support the classification. *See also Romer*, 517 U.S. at 635. It is, after all, only "*absent some reason to infer antipathy*" that the "Constitution presumes that . . . even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted." *Vance v. Bradley* 440 U.S. 93, 97 (1979) (emphasis added). Here, Texas offers nothing more than the majority's negative moral judgment to support its discrimination, and that should end the matter with a ruling of unconstitutionality.

This 1970s classification is "divorced from any factual context from which [the Court] could discern a relationship to legitimate state interests." *Romer*, 517 U.S. at 635. It is solely an effort to mark a difference in status, to send a message in the criminal law that one group is condemned by the majority. This impermissible and irrational double standard must be removed from Texas's criminal code.

B. The Broader Realities Reinforce This Law's Affront to Core Principles of Equal Protection.

Additional considerations confirm the violation of equal protection here. First, the Homosexual Conduct Law does not just discriminate against gay and lesbian Texans in their private intimate relations, but brands gay persons as second-class citizens

and legitimizes discrimination against them in all aspects of life. Second, the discrimination worked by this law reflects and reinforces a century-long history of discrimination against gay Americans. The real-world context and history of discrimination further expose the law's illegitimacy. *See Romer*, 517 U.S. at 623-31 (considering in detail the functioning and historical background of challenged enactment); *Moreno*, 413 U.S. at 537 (considering "practical effect" of classification); *Eisenstadt*, 405 U.S. at 447-52 (considering social and legal backdrop in finding equal protection violation under rational basis standard). Where a law "circumscribe[s] a class of persons characterized by some unpopular trait or affiliation," there is a "special likelihood of bias on the part of the ruling majority." *N.Y. Trans. Auth. v. Beazer*, 440 U.S. 568, 593 (1979).

1. The Homosexual Conduct Law Brands Gay Persons As Second-Class Citizens and Licenses Wide-Ranging Discrimination Against Them.

On the surface, the Homosexual Conduct Law may appear to discriminate against gay men and lesbians in only one sphere of life – albeit a vitally important one, *see supra* Point I – by criminalizing the sexual intimacy of same-sex adult couples but not the very same conduct engaged in by different-sex couples. In reality, the scope of the discrimination is much broader. Today, sodomy laws – even facially evenhanded sodomy laws – are widely understood to brand gay citizens as criminals by virtue of their sexual orientation, and are thus used to legitimate across-the-board discrimination. Texas's enactment of a facially discriminatory law formalizes that pejorative classification of lesbians and gay men as second-class citizens.

Historically, the vast majority of consensual sodomy laws have not differentiated between same-sex and different-sex couples, and nine of the 13 sodomy laws still on the books today retain that traditional characteristic of being facially evenhanded. *See supra* at 6 & note 5, 21-22. In recent times, however, even facially non-discriminatory laws have been understood as targeting gay men and lesbians rather than heterosexual couples

who engage in identical forms of private sexual intimacy covered by the laws. This contemporary understanding of these laws was reflected in – and reinforced by – the Court's reasoning in *Bowers*, which read Georgia's facially *neutral* law as reflecting "the presumed belief of a majority of the electorate in Georgia that *homosexual* sodomy is immoral and unacceptable." 478 U.S. at 196 (emphasis added). *See generally* Nan D. Hunter, *Life After* Hardwick, 27 Harv. C.R.-C.L. L. Rev. 531, 542 (1992).

Thus, in recent decades, the existence of facially nondiscriminatory sodomy laws – indeed, the mere power of state legislatures to pass such laws, whether or not that power is exercised – has been used to justify myriad forms of discrimination against gay and lesbian Americans as presumptive criminals. For example, sodomy laws are often invoked to deny or restrict gay parents' custody of or visitation with their own children,[28] to deny public employment to gay people,[29] and to block protection of gay citizens under hate-crime legislation.[30]

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[28] *See, e.g., Ex Parte D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998) (affirming imposition of severe visitation restrictions on lesbian mother, reasoning, "the conduct inherent in lesbianism is illegal in Alabama"); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) (removing child from lesbian mother and giving custody to child's grandmother, concluding, "[c]onduct inherent in lesbianism is punishable as a Class 6 felony in the Commonwealth, Code § 18.2-361; thus, that conduct is another important consideration in determining custody"); *see also Ex parte H.H.*, 830 So. 2d 21, 35 (Ala. 2002) (Moore, C.J., specially concurring) ("disfavoring practicing homosexuals in custody matters promotes the general welfare of the people of our State in accordance with our law").

[29] *See, e.g., Shahar v. Bowers*, 114 F.3d 1097, 1105 & n.17 (11th Cir. 1997); *see also Walls v. City of Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990) (upholding public employment application question about homosexual relations "because the *Bowers* decision is controlling").

[30] An amendment to include "sexual orientation" in the Utah hate crime bill was defeated after a representative referred to Utah's sodomy law, stating that the "effect of granting special protection under [the hate crime act] to homosexuals would be contradictory under Utah law." *See* Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 Utah L. Rev. 209, 222 (quotation marks omitted). Similarly, a hate crime bill in North Carolina covering sexual orientation was rejected in 2000 after the House

Indeed, the dissent in *Romer* argued that the Court's holding in *Bowers* alone was sufficient justification for the sweeping discrimination against gay citizens worked by Colorado Amendment 2, *Romer*, 517 U.S. at 640-43 (Scalia, J., dissenting) – even though Colorado's former sodomy law had applied to all and had been repealed years before, *see* 1971 Colo. Sess. Laws ch. 121.

Texas has gone further, abandoning any pretense of non-discriminatory legislation in this area by enacting a law that facially discriminates against gay and lesbian couples. By introducing that express classification into the criminal law, Texas has placed its imprimatur on discrimination based on sexual orientation. That has had far-reaching implications for gay citizens in virtually every area of their lives. As the State stipulated in an earlier challenge to Section 21.06, the law "brands lesbians and gay men as criminals and thereby legally sanctions discrimination against them in a variety of ways unrelated to the criminal law," including "in the context of employment, family issues, and housing." *Morales*, 826 S.W.2d at 202-03; *see also Jegley*, 80 S.W.3d at 343 (under same-sex-only sodomy laws, gay people "suffer the brand of criminal impressed upon them by a[n] . . . unconstitutional law").

The Homosexual Conduct Law and similar statutes in other States have been routinely invoked to limit the custody or visitation that fit, gay parents would otherwise have with their own children.[31] Likewise, this law is cited as a basis for preventing

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heard testimony about the illegality of sodomy. People for the Am. Way Found., *Hostile Climate: Report on Anti-Gay Activity* 257 (2000).

[31] *See, e.g., Jegley*, 80 S.W.3d at 343 (observing that Arkansas sodomy statute had been used in harmful ways "outside the criminal context," including in prior case denying lesbian custody of her children); *see also* Jo Ann Zuniga, *Gay Parents Are Fighting Back Against Blackmail, Court Bias*, Hous. Chron., June 27, 1994, at A11 (reporting that common tactic of vilifying gay parents in custody battle is "give[n] . . . teeth [by] Section 21.06"); *J.P. v. P.W.*, 772 S.W.2d 786, 792 (Mo. Ct. App. 1989) (restricting gay father's visitation rights, in part because a "statute of this state declares that deviate sexual intercourse with another person of the same sex is illegal.

lesbians and gay men from serving as foster parents, simply because of their presumed "criminal status" and wholly apart from any inquiry into the best interests of children awaiting a home. *See, e.g.*, Polly Hughes, *Bill Would Ban Gay Texans From Adopting Children*, Hous. Chron., Dec. 11, 1998, at A38 (reporting on adoption and foster-care policies). Section 21.06 and other discriminatory consensual sodomy offenses have been used to interfere with equal employment opportunities for lesbians and gay men. *England*, 846 S.W.2d at 958; *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 144, 147-48 (N.D. Tex. 1981) (upholding denial of employment to gay man), *aff'd*, 669 F.2d 732 (5th Cir. 1982); *Baker*, 553 F. Supp. at 1130, 1147. These laws are also used to block the adoption of civil rights ordinances that would prohibit sexual orientation discrimination in employment and other core aspects of civil society.[32] The Homosexual Conduct Law has even been cited in arguments for imposing the death penalty on a gay defendant, *Burdine v. Johnson*, 66 F. Supp. 2d 854, 857 (S.D. Tex. 1999), *aff'd*, 262 F.3d 336 (5th Cir. 2001) (*en banc*), *cert. denied*, 122 S. Ct. 2347 (2002). In these many ways and others, the Homosexual Conduct Law is functioning as a legal reference point that endorses gay inequality.

Thus, even in the absence of actual arrest and prosecution, the Homosexual Conduct Law labels gay men and lesbians as criminals and legitimates discrimination against them on that basis.[33] Classification of gay Texans as second-class citizens is

§ 566.090.1"). *See generally* Diana Hassel, *The Use of Criminal Sodomy Laws in Civil Litigation*, 79 Tex. L. Rev. 813 (2001).

[32] *See, e.g.*, Dianna Hunt, *Plan to Ban Anti-Gay Bias in Fort Worth Dies*, Dallas Morning News, Jan. 20, 1999, at 32A (local anti-discrimination measure in Texas abandoned after several members of town council expressed desire to wait until status of state's sodomy law was resolved); *see also* Arthur S. Leonard, *Legislative Notes*, 1998 Lesbian/Gay L. Notes 101, 115 (Kansas sodomy law cited in support of halting Topeka Human Rights Commission from investigating anti-gay discrimination).

[33] In Texas, calling someone a "homosexual" or using epithets that mean the same is slanderous *per se* because of the implication that he or she has violated the Homosexual Conduct Law. *Thomas v. Bynum*, No. 04-02-

indeed the primary function of this law in society, as evidenced by the rarity of direct criminal enforcement. Texas makes no pretense of vigorously enforcing this law or of actually preventing any private, consensual adult sexual behavior. *Morales*, 826 S.W.2d at 203 ("The State concedes that it rarely, if ever, enforces § 21.06"). Only rare couples who are caught through some extremely unlucky series of events, like Lawrence and Garner in this case, ever directly suffer criminal prosecution and punishment for their discreet intimacy. *Model Penal Code* § 213.2 cmt. 2 ("To the extent ... that laws against deviate sexual behavior are enforced against private conduct between consenting adults, the result is episodic and capricious selection of an infinitesimal fraction of offenders for severe punishment"). The branding function of the Homosexual Conduct Law and the civil harms that follow from it forcefully underscore that the law violates equal protection. It "has the peculiar property of imposing a broad and undifferentiated disability on a single named group," *Romer*, 517 U.S. at 632, without rational and legitimate justification.

2. The Homosexual Conduct Law Reflects and Helps Fuel a Continuing History of Discrimination Against Gay Americans.

The Homosexual Conduct Law is only one manifestation of a history of irrational anti-gay discrimination.[34] Although our Nation has no legal tradition making the criminality of private sexuality turn on whether a couple is homosexual or heterosexual, *see supra* at 21-22, the laws of this Nation have reflected and played a role in virulent anti-gay discrimination over the last century. In enforcing the Equal Protection Clause today, this history informs the Court's assessment of whether a legal classification

00036-CV, 2002 WL 31829509, at *2 (Tex. App. Dec. 18, 2002); *Head v. Newton*, 596 S.W.2d 209, 210 (Tex. App. 1980).

[34] *See generally* Jonathan N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* (rev. ed. 1992); John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* (2d ed. 1997); *Hidden From History: Reclaiming the Gay and Lesbian Past* (Martin Duberman, Martha Vicinus & George Chauncey, Jr. eds., 1990); *Lesbians, Gay Men and the Law* (William B. Rubenstein ed., 1993).

that discriminates against those with a same-sex sexual orientation rests on irrational bias. *See Vance*, 440 U.S. at 97 (Court is attuned to "some reason to infer antipathy"); *see also, e.g., Romer*, 517 U.S. at 624-31.

Anti-gay discrimination was long justified by the false view that gay individuals were "sick." Until 1973, the year Section 21.06 was passed, homosexuality was incorrectly classified as a mental disease. *See supra* note 10; *see also Boutilier v. INS*, 387 U.S. 118 (1967) (holding that "psychopathic personality" exclusion in immigration law applied to homosexual persons). Deeming them to be "sex deviants," States involuntarily committed gay men and lesbians to mental institutions under extremely inhumane conditions. *See, e.g.*, James A. Garland, *The Low Road to Violence: Governmental Discrimination as a Catalyst for Pandemic Hate Crime*, 10 L. & Sexuality 1, 75-76 (2001). "Treatments" to "cure" homosexuality were often sadistically cruel. *See, e.g.*, Jonathan N. Katz, *Gay/Lesbian Almanac* 156 (1983) (describing "treatment" involving "repeated searing with a hot iron or chemical of [the] 'pervert' patient's loins"); Jonathan N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 129-208 (rev. ed. 1992). Even today, discredited "therapies" to "change" the very sexual orientation of gay adults continue this destructive pathologizing of gay citizens.[35]

The Homosexual Conduct Law is a remnant of a historical pattern of repressive law enforcement measures that have reinforced an outcast status for gay citizens. In the past, state laws authorized the arrest of individuals simply for "appearing" to be gay or lesbian, and the closure of businesses simply for serving gay patrons. *See, e.g., One Eleven Wines & Liqours, Inc. v. Division of Alcohol Beverage Control*, 235 A.2d 12, 14 (N.J. 1967) (reviewing and rejecting agency policy of suspending businesses' licenses simply for "permitting the congregation of apparent homosexuals"). McCarthy-era and later witch hunts led to the

[35] *See, e.g.*, American Psychiatric Ass'n, *Position Statement: Psychiatric Treatment and Sexual Orientation* (1998), *available at* http://www.psych.org/archives/980020.pdf.

firing from federal and federal-contractor employment of thousands of persons suspected of being homosexuals. Katz, *Gay American History*, at 91-109; *Norton v. Macy*, 417 F.2d 1161, 1162 (D.C. Cir. 1969).[36]

Official repression has often been directed at preventing gay Americans from organizing politically to advocate for and protect their rights. The earliest gay political organization in America, formed in Chicago in the mid-1920s, was silenced by police raids, arrests, and firings from employment. *See, e.g*, William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. Pa. L. Rev. 419, 438 & n.77 (2001). Similar groups that emerged after World War II also suffered severe harassment. *See, e.g., id.* at 443-48. Educational publications about homosexuality were censored as "obscene." *See, e.g., One, Inc. v. Olesen*, 241 F.2d 772 (9th Cir. 1957), *rev'd*, 355 U.S. 371 (1958) (per curiam).

Since the late 1960s and early 1970s, gay Americans have made substantial strides toward securing equal rights. *See supra* at 17-19, 30-31. But there is still substantial inequality and backlash. In passing a statute last year that protects against sexual-orientation discrimination, the New York state legislature found that anti-gay prejudice "has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering." N.Y. Sexual Orientation Non-Discrimination Act, 2002 N.Y. Laws ch. 2. Cruel anti-gay harassment in schools remains common. *See, e.g., Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996). And violence motivated by irrational hatred of gay people can result in crimes of unimaginable brutality, as occurred with the murder of college student Matthew Shepard. *See, e.g., A Vicious Attack on Gay Student, Beaten, Burned and Left for Dead*, N.Y. Newsday, Oct. 10,

[36] Private institutions like Harvard University also mounted secret but systematic efforts to root out gay people. Amit R. Paley, *The Secret Court of 1920*, Harv. Crimson, Nov. 21, 2002, *available at* http://www.thecrimson.com/article.aspx?ref=255428 (accessed Jan. 14, 2003).

1998, at A4. Such killings, together with lesser forms of violence, intimidation, and discrimination, remain extremely effective in deterring gay Americans from revealing their sexual orientation, and thus from working openly to end anti-gay discrimination. By marking gay men and lesbians as criminals, discriminatory sodomy laws reinforce and intensify the irrational prejudice that leads to such violence. *See* Leslie, *Creating Criminals*, 35 Harv. C.R.-C.L. L. Rev. at 124.

The Constitution "neither knows nor tolerates classes among citizens." *Romer*, 517 U.S. at 623 (quotation marks omitted). In distinguishing laws based on hostility from ordinary legislative linedrawing, the Court should not ignore the persistent and destructive American history of anti-gay discrimination. The Homosexual Conduct Law is the State's own endorsement of discrimination against gay men and lesbians.

C. Equal Protection Concerns Are Particularly Strong Here Because of the Personal Burdens Imposed by This Criminal Law.

The Constitution's equal protection and due process protections are articulated together. U.S. Const. amend. XIV, § 1. Those dual safeguards reinforce one another, including in cases where liberty concerns may not rise to the level of a fundamental right or may be indirectly implicated. In this case, regardless of the Court's ultimate ruling on Point I, the personal burdens and restrictions on freedom imposed by Section 21.06 strengthen the need to reject its discriminatory classification.

On numerous occasions, the Court has held that where an extremely important personal interest is at stake, the State may *not* grant some citizens the ability to vindicate that interest but altogether deny other citizens that ability, even if the State *could* employ an evenhanded denial to all citizens. For example, there is no due process right to appellate review of decrees severing the parent-child bond. *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996). Where, however, the State grants review of such decrees to its citizens generally, it may not deny review to the few who cannot

pay costs. *Id.* at 107; *see also, e.g., Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (although there is no right to obtain divorce, where State makes divorce available to most couples, it may not bar indigent persons from divorce due to inability to pay). That is so, even though wealth classifications are not inherently suspect, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), and the imposition of costs on litigants is otherwise rationally related to a legitimate state interest, *M.L.B.*, 519 U.S. at 123. Because the imposition of costs in *M.L.B.* at least indirectly implicated "state controls or intrusions on family relationships," *id.* at 116, the Court closely examined the unique burden the State had placed on the poor and rejected it as offensive to the combined guarantees of equal protection and due process. *See id.* at 120. The constitutional challenge in this case is also of an especially serious order, because it "endeavor[s] to defend against the States's destruction of family bonds, and to resist the brand associated with" criminality that is now imposed only on the deeply personal and intimate sexual relations of gay adults. *Cf. id.* at 125. As in *M.L.B.*, the outcome here should "reflect both equal protection and due process concerns." *Id.* at 120.

Similarly, there is no fundamental right to an education, and undocumented aliens are not a suspect class, but in light of the importance of the interest in education in our society, a law barring undocumented aliens from receiving a state-funded education will be rigorously scrutinized. *Plyler v. Doe*, 457 U.S. 202, 216-24 (1982). The nature of the deprivation, though not a fundamental right, informs and strengthens the equal protection claim. As the Court reasoned in *Plyler*, exclusion of one isolated group from such an important sphere "poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Id.* at 221-22. It imposes a "stigma" that "will mark them for the rest of their lives." *Id.* at 223. Here, too, the Court must not ignore the stigma and the obstacle to equal advancement in society that accompanies the discriminatory law that Texas seeks to defend in assessing

its validity under the Equal Protection Clause. This classification likewise "involve[s] the State in the creation of permanent class distinctions" and relegates gay men and lesbians to "second-class social status." *Cf. id.* at 234 (Blackmun, J., concurring).

The Equal Protection Clause is a critical guardian of liberty as well as equality. It defends against unreasonable exactions by the State because it "requires the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan*, 497 U.S. at 300 (Scalia, J., concurring); *accord Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring). The Texas Homosexual Conduct Law makes a mockery of that principle. Just as the majority may not decide that the availability of divorce or education is critical for the majority itself but then deny those benefits to a few, so Texas may not determine that freedom from state intrusion into the private sexual intimacy of two consenting adults is an important aspect of liberty for most of its citizens, but then deny that liberty to a minority – particularly a minority historically subject to discrimination. Consensual sexual decisions are too clearly matters for individual decisionmaking, not for imposition by the State. The discriminatory criminal law at issue here seriously diminishes the personal relationships and legal standing of a distinct class, and under the Fourteenth Amendment cannot stand.

CONCLUSION

For the foregoing reasons, the judgment of the Texas Court of Appeals upholding Section 21.06 and affirming Petitioners' criminal convictions thereunder should be reversed.

Respectfully Submitted,

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